114-138

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 199.

THE FARMINGTON VILLAGE CORPORATION, PLAINTIFF IN ERROR,

vs.

EBEN F. PILLSBURY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

FILED APRIL 25, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Citation.*

The United States of America:

To Eben F. Pillsbury, of Boston, in the county of Suffolk, and State of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the first circuit within and for the district of Maine, wherein The Farmington Village Corporation, a body corporate and public, created by the laws of the State of Maine, a citizen of said State of Maine is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Lowell, judge of the circuit court of the United States for the first judicial circuit, this fifth day of April, in the year of our Lord one thousand eight hundred and eighty-two.

JOHN LOWELL, *Circuit Judge.*

2 *Service.*

On this twentieth day of April, in the year of our Lord one thousand eight hundred and eighty-two, the defendant in error, Eben F. Pillsbury, hereby acknowledges lawful service of this citation, and hereby waives all objections to the legality of such service.

By CHARLES F. LIBBY,
His Attorney of Record.

(Endorsed:) Citation. Farmington Village Corporation, pl'ff in error *vs.* Eben F. Pillsbury. Returnable October term, 1882, to Supreme Court of United States. From the office of T. H. Haskell, Portland, Maine.

3 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judge of the circuit court of the United States for the district of Maine, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Eben F. Pillsbury, of Boston, in the county of Suffolk, and State of Massachusetts, a citizen of said State of Massachusetts, the party plaintiff, and the Farmington Village Corporation, a body corporate and public, created by thelaws of the State of Maine, and a citizen of said State of Maine, the party defendant, a manifest error hath happened, to the great damage of the said Farmington Village Corporation, the party defendant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected,

and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fifth day of April, in the year of our Lord one thousand eight hundred and eighty-two.

A. H. DAVIS,
Clerk of the Circuit Court of the United States, for the First Circuit within and for the District of Maine.

Allowed by—

JOHN LOWELL,
Circuit Judge for the First Judicial Circuit of the United States.

4 Circuit Court of the United States, District of Maine. September Term, A. D. 1881.

And now here the judges of the circuit court of the United States in and for said district make return of this writ, by annexing hereto, and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein.

In testimony whereof, I, A. H. Davis, clerk of said circuit court, have hereunto set my hand and the seal of said court, this nineteenth day of April, in the year of our Lord eighteen hundred and eighty-two.

[SEAL.] A. H. DAVIS, *Clerk.*

Endorsed: Writ of error. Farmington Village Corporation *vs.* Eben F. Pillsbury. Ret. Oct. term, 1882. From the office of T. H. Haskell, Portland Maine.

Circuit Court of the United States, District of Maine. September Term, A. D. 1881.

I, A. H. Davis, clerk of the circuit court of the United States, Maine district, hereby certify that a true and perfect copy of the foregoing writ of error, wherein the Farmington Village Corporation is plaintiff in error and Eben F. Pillsbury is defendant in error, was lodged for the said defendant in error in the clerk's office on the 19th day of April, A. D. 1882.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court, this 19th day of April, A. D. 1882.

[SEAL.] A. H. DAVIS, *Clerk.*

5 MAINE DISTRICT, *First Circuit, ss:*

At a term of the circuit court of the United States for the first circuit, begun and holden at Portland, within and for the district of Maine, on Saturday, the twenty-third day of April, in the year of our Lord one thousand eight hundred and eighty-one.

Before the Honorable John Lowell, circuit judge, and the Honorable Edward Fox, district judge.

EBEN F. PILLSBURY, of Boston, in the county of Suffolk and the State of Massachusetts, ac itizen of said State of Massachusetts, Plaintiff.

versus

THE FARMINGTON VILLAGE CORPORATION, a body corporate and politic, created by the laws of the State of Maine, and a citizen of said State, Defendant. } No. 23.

In a plea of the case, for that the said defendant corporation at said Portland, on the day of the purchase of this writ, being indebted to the plaintiff in the sum of nine thousand nine hundred and sixty-nine dollars and ninety-seven cents, according to the account annexed, in consideration thereof then and there promised the plaintiff to pay him said sum on demand.

6 Also, for that the said defendant, at said Portland, heretofore, to wit, on the day of the purchase of this writ, being indebted to the plaintiff in one other sum of three thousand dollars and —— cents for interest on the forbearance of divers sums of money before then due and owing from the said defendant to the plaintiff, in consideration thereof then and there promised the plaintiff to pay him the same on demand; yet the said defendant, though often thereto requested, has not paid the same or any part thereof, but neglects and refuses so to do.

Also for that the said defendant, at said Portland heretofore, to wit, on the day of the purchase of this w-it, being indebted to the plaintiff in one other sum of ten thousand dollars for goods before that time sold and delivered by the plaintiff to the defendant at his request; and also for work before then done and materials for the same provided by the plaintiff for said defendant at his request; and also for other money before then lent by the plaintiff to defendant at his request; and also for other money before then paid by the plaintiff for the use of the said defendant at his re-

7 quest; and also for other money before that time had and received by the said defendant for the use of the plaintiff; and also for other money for interest upon other moneys then due and owing from said defendant to said plaintiff, and by the plaintiff lent and advanced to said defendant at his request for divers long spaces of time then elapsed; and also for other money found to be due from the said defendant to the plaintiff upon an account then stated between them, in consideration thereof then and there promised the plaintiff to pay him the several moneys aforesaid on demand, yet the said defendant has never paid any of said moneys, but wholly neglects and refuses so to do.

Under this count plaintiff will give in evidence and claim to recover the amount of the several coupons set forth in the account annexed to this writ, and will claim to recover interest on the same from the time they became severally due and payable.

Yet the said defendant corporation, though requested, has not paid the same, but neglects so to do, to the damage of the said
8 plaintiff, as he says, the sum of fifteen thousand dollars.

Account Annexed.

The Farmington Village Corporation to Eben F. Pillsbury, Dr.

To amount due on the following over-due coupons for semi-annual interest on the bonds of said corporation, numbered as hereinafter set forth, said bonds bearing date July 1, 1870, and the coupons for semi-annual interest falling due every six months thereafter in the order of the numbers they bear, to wit:

16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 1) for $100	$48 00
Interest on same to date	12 24
17 coupons (No. 3 to 19, inclusive), for semi-annual interest on bond (No. 2) for $100	51 00
Interest on same to date	13 77
17 coupons (No. 3 to 19, inclusive), for semi-annual interest on bond (No. 3) for $100	51 00
Interest on same to date	13 77
16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 4) for $100	48 00
Interest on same to date	12 24
16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 5) for $100	48 00
Interest on same to date	12 24
16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 6) for $100	48 00
Interest on same to date	12 24
15 coupons (No. 5 to 19, inclusive), for semi-annual interest on bond (No. 7) for $100	45 00
Interest on same to date	10 80
9 16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 8) for $100	48 00
Interest on same to date	12 24
16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 9) for $100	48 00
Interest on same to date	12 24
16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 10) for $100	48 00
Interest on same to date	12 24
16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 11) for $100	48 00
Interest on same to date	12 24

16 coupons (No. 5 to 19, inclusive), for semi-annual interest on bond (No. 12) for $100	$45 00
Interest on same to date	10 80
16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 13) for $100	48 00
Interest on same to date	12 24
16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 14) for $100	48 00
Interest on same to date	12 24
16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 15) for $100	48 00
Interest on same to date	12 24
16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 16) for $100	48 00
Interest on same to date	12 24
18 coupons (No. 2 to 19, inclusive), for semi-annual interest on bond (No. 17) for $100	54 00
Interest on same to date	15 39
19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 18) for $100	57 00
Interest on same to date	17 10
16 coupons (No. 3 to 5, inclusive), (No. 7 to 19, inclusive), for semi-annual interest on bond (No. 19) for $100	48 00
Interest on same to date	12 51
19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 20) for $100	57 00
Interest on same to date	17 10
16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 21) for $100	48 00
Interest on same to date	12 24
15 coupons (No. 5 to 19, inclusive), for semi-annual interest on bond (No. 22) for $100	45 00
Interest on same to date	10 80
19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 23) for $100	57 00
Interest on same to date	17 10
19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 24) for $100	57 00
Interest on same to date	17 10
19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 25) for $100	57 00
Interest on same to date	17 10
15 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 26) for $100	45 00
Interest on same to date	10 80
15 coupons (No. 5 to 19, inclusive), for semi-annual interest on bond (No. 27) for $100	45 00
Interest on same to date	10 80
16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 28) for $100	48 00
Interest on same to date	12 24

11	16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 29) for $100	$48 00
	Interest on same to date	12 24
	4 coupons (No. 4 to 7, inclusive), for semi-annual interest on bond (No. 30) for $100	12 00
	Interest on same to date	5 22
	19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 31) for $100	57 00
	Interest on same to date	17 10
	19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 32) for $100	57 00
	Interest on same to date	17 10
	19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 33) for $100	57 00
	Interest on same to date	17 10
	19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 34) for $100	57 00
	Interest on same to date	17 10
	12 coupons (No. 8 to 19, inclusive), for semi-annual interest on bond (No. 35) for $100	36 00
	Interest on same to date	7 02
	19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 36) for $100	57 00
	Interest on same to date	17 10
	19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 37) for $100	57 00
	Interest on same to date	17 10
	15 coupons (No. 4 to 5, inclusive, No. 7 to 19, inclusive), for semi-annual interest on bond (No. 38) for $100	45 00
	Interest on same to date	10 98
	14 coupons (No. 4 to 5, inclusive, No. 8 to 19, inclusive), for semi-annual interest on bond (No. 39) for $100	42 00
	Interest on same to date	9 81
12	4 coupons (No. 4 to 7 inclusive,) for semi-annual interest on bond (No. 41) for $100	12 00
	Interest on same to date	5 22
	4 coupons (No. 3 to 6 inclusive), for semi-annual interest on bond (No. 42) for $100	12 00
	Interest on same to date	5 58
	19 coupons (No. 1 to 19 inclusive), for semi-annual interest on bond (No. 43) for $100	57 00
	Interest on same to date	17 10
	19 coupons (No. 1 to 19 inclusive), for semi-annual interest on bond (No. 44) for $100	57 00
	Interest on same to date	17 10
	19 coupons (No. 1 to 19 inclusive), for semi-annual interest on bond (No. 45) for $100	57 00
	Interest on same to date	17 10
	17 coupons (No. 3 to 19 inclusive), for semi-annual interest on bond (No. 46) for $100	51 00
	Interest on same to date	13 77

19 coupons (No. 1 to 19 inclusive), for semi-annual interest on bond (No. 47) for $100	$57 00
Interest on same to date	17 10
19 coupons (No. 1 to 19 inclusive), for semi-annual interest on bond (No. 48) for $100	57 00
Interest on same to date	17 10
19 coupons (No. 1 to 19 inclusive), for semi-annual interest on bond (No. 49) for $100	57 00
Interest on same to date	17 10
16 coupons (No. 4 to 19 inclusive), for semi-annual interest on bond (No. 50) for $100	48 04
Interest on same to date	12 24
3 coupons (Nos. 5, 6, 7), for semi-annual interest on bond (No. 1) for $100	9 00
Interest on same to date	3 78
13 3 coupons (Nos. 5, 7, 8), for semi-annual interest on bond (No. 2) for $100	9 60
Interest on same to date	3 60
16 coupons (No. 4 to 19 inclusive), for semi-annual interest on bond (No. 3) for $100	48 00
Interest on same to date	12 24
16 coupons (No. 4 to 19 inclusive), for semi-annual interest on bond (No. 4) for $100	48 00
Interest on same to date	12 24
3 coupons (Nos. 4, 5, 7), for semi-annual interest on bond (No. 5) for $100	9 00
Interest on same to date	3 96
16 coupons (No. 4 to 19 inclusive), for semi-annual interest on bond (No. 6) for $100	48 00
Interest on same to date	12 24
2 coupons (Nos. 6 & 7), for semi-annual interest on bond (No. 7) for $100	6 00
Interest on same to date	2 43
4 coupons (Nos. 5, 6, 7, & 8), for semi-annual interest on bond (No. 8) for $100	12 00
Interest on same to date	4 86
4 coupons (Nos. 4, 5, 6, & 7), for semi-annual interest on bond (No. 9) for $100	12 00
Interest on same to date	5 22
3 coupons (Nos. 5, 6, & 7), for semi-annual interest on bond (No. 12) for $100	9 00
Interest on same to date	3 78
3 coupons (Nos. 4, 5, & 7), for semi-annual interest on bond (No. 13) for $100	9 00
Interest on same to date	3 96
3 coupons (Nos. 5, 6, & 7), for semi-annual interest on bond (No. 14) for $100	9 00
Interest on same to date	3 78
14 4 coupons (Nos. 4, 5, 6, & 7), for semi-annual interest on bond (No. 15) for $100	12 00
Interest on same to date	5 22

15 coupons (No. 5 to 19, inclusive), for semi-annual interest on bond (No. 16) for $100	$45 00
Interest on same to date	10 80
16 coupons (No 4 to 19, inclusive), for semi-annual interest on bond (No. 17) for $100	48 00
Interest on same to date	12 24
2 coupons (Nos. 5 & 7), for semi-annual interest on bond (No. 18) for $100	6 00
Interest on same to date	2 52
1 coupon (No. 5), for semi-annual interest on bond (No. 19) for $100	3 00
Interest on same to date	1 35
15 coupons (Nos. 5 to 19, inclusive), for semi-annual interest on bond (No. 20) for $100	45 00
Interest on same to date	10 80
2 coupons (Nos. 4 & 5), for semi-annual interest on bond (No. 21) for $100	6 00
Interest on same to date	2 79
12 coupons (No. 8 to 19, inclusive), for semi-annual interest on bond (No. 22) for $100	36 00
Interest on same to date	7 02
15 coupons (No. 5 to 19, inclusive), for semi-annual interest on bond (No. 23) for $100	45 00
Interest on same to date	10 80
15 coupons (No. 5 to 19, inclusive), for semi-annual interest on bond (No. 24) for $100	45 00
Interest on same to date	10 80
15 coupons (No. 5 to 19, inclusive), for semi-annual interest on bond (No. 25) for $100	45 00
Interest on same to date	10 80
15 coupons (No. 5 to 19, inclusive), for semi-annual interest on bond (No. 28) for $100	45 00
Interest on same to date	10 80
4 coupons (No. 4, 5, 6, 7), for semi-annual interest on bond (No. 29) for $100	12 00
Interest on same to date	5 22
4 coupons (Nos. 4, 5, 6, & 7), for semi-annual interest on bond (No. 30) for $100	12 00
Interest on same to date	5 22
15 coupons (No. 4 to 6, inclusive, No. 8 to 19, inclusive), for semi-annual interest on bond (No. 31) for $100	45 00
Interest on same to date	11 07
15 coupons (Nos. 4 & 5 and 7 to 19, inclusive), for semi-annual interest on bond No. 32) for $100	45 00
Interest on same to date	10 98
4 coupons (Nos. 4, 5, 6, & 7), for semi-annual interest on bond (No. 33) for $100	12 00
Interest on same to date	5 22
16 coupons (No. 4 to 19, inclusive), for semi-annual interest on bond (No. 34) for $100	48 00
Interest on same to date	12 24

	4 coupons (Nos. 4, 5, 6, & 7), for semi-annual interest on bond (No. 35) for $100	$12 00
	Interest on same to date	5 22
	14 coupons (No. 4 & No. 7 to 19, inclusive), for semi-annual interest on bond (No. 36) for $100	42 00
	Interest on same to date	9 63
	15 coupons (No. 5 to 19, inclusive), for semi-annual interest on bond (No. 37) for $100	45 00
	Interest on same to date	10 80
	2 coupons (Nos. 4 & 5), for semi-annual interest on bond (No. 42) for $100	6 00
	Interest on same to date	2 79
16	15 coupons (No. 5 to 19, inclusive), for semi-annual interest on bond (No. 43) for $100	45 08
	Interest on same to date	10 80
	17 coupons (No. 3 to 19, inclusive), for semi-annual interest on bond (No. 44) for $100	51 00
	Interest on same to date	13 77
	4 coupons (No. 4 to 7, inclusive), for semi-annual interest on bond (No. 45) for $100	12 00
	Interest on same to date	5 22
	3 coupons (Nos. 5, 6, & 7), for semi-annual interest on bond (No. 46) for $100	9 00
	Interest on same to date	3 78
	15 coupons (No. 5 to 19, inclusive), for semi-annual interest on bond (No. 49) for $100	45 00
	Interest on same to date	10 80
	15 coupons (No. 5 to 19, inclusive), for semi-annual interest on bond (No. 50) for $100	45 00
	Interest on same to date	10 80
	17 coupons (No. 3 to 19, inclusive), for semi-annual interest on bond (No. 1) for $500	255 00
	Interest on same to date	68 85
	19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 2) for $500	285 00
	Interest on same to date	85 50
	18 coupons (No. 1 to 5, inclusive), No. 7 to 19, inclusive), for semi-annual interest on bond (No. 3) for $500	270 00
	Interest on same to date	79 20
	19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 4) for $500	285 00
	Interest on same to date	85 50
	16 coupons (No. 2 to 5, inclusive, No. 7 to 19, inclusive), for semi-annual interest on bond (No. 5) for $500	240 00
	Interest on same to date	63 00
17	17 coupons (No. 1 to 5, inclusive, No. 7 to 19, inclusive), for semi-annual interest on bond (No. 6) for $500	255 00
	Interest on same to date	71 10

19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 7) for $500	$285 00
Interest on same to date	85 50
19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 8) for $500	285 00
Interest on same to date	85 50
14 coupons (Nos. 4 & 5, & No. 8 to 19, inclusive), for semi-annual interest on bond (No. 9) for $500	210 00
Interest on same to date	49 05
19 coupons (No. 1 to 19, inclusive), for semi-annual interest on bond (No. 10) for $500	285 00
Interest on same to date	85 50
15 coupons (No. 3 to 5, inclusive, No. 8 to 19, inclusive), for semi-annual interest on bond (No. 1) for $500	225 00
Interest on same to date	56 70
17 coupons (No. 3 to 19, inclusive), for semi-annual interest on bond (No. 2) for $500	255 00
Interest on same to date	68 85
3 coupons (Nos. 1, 2, & 3), for semi-annual interest on bond (No. 3) for $500	45 00
Interest on same to date	24 30
15 coupons (Nos. 2, 4, 5, & No. 8 to 19, inclusive), for semi-annual interest on bond (No. 4) for $500	225 00
Interest on same to date	57 15
18 coupons (No. 1 to 5, inclusive, No. 7 to 19, inclusive), for semi-annual interest on bond (No. 7) for $500	270 00
Interest on same to date	79 20
15 coupons (No. 3 to 5, inclusive, & No. 8 to 19, inclusive), for semi-annual interest on bond (No. 8) for $500	225 00
Interest on same to date	56 70
18 10 coupons (Nos. 8, 9, 11, 12, 13, & 14, No. 16 to 19, inclusive), for semi-annual interest on bond (No. 9) for $500	150 00
Interest on same to date	28 35
17 coupons (No. 3 to 19, inclusive), for semi-annual interest on bond (No. 10) for $500	255 00
Interest on same to date	68 85
	$9,969 97

And plaintiff avers that said coupons were duly issued with and as a part of the above-described bonds of said corporation, and that said coupons were for a valuable consideration detached therefrom and assigned by delivery to the plaintiff, who is now the holder of the same, for a valuable consideration; and plaintiff further avers that payment of said coupons was duly demanded of said corporation at the time they became due, respectively, and claims to recover interest thereon from the time they became due and payable as aforesaid.

This action was brought for and entered in this court at the Sep-

tember term thereof, in the year of our Lord one thousand eight hundred and eighty, and continued to the present term, when, on motion of the defendant corporation, the plaintiff was required to furnish security for costs in the sum of two hundred and fifty dollars, and the order of court in that regard was duly complied with And on the twelfth day of May, in the year of our Lord one thousand eight hundred and eighty-one, was filed the following:

19 *Stipulation Waiving Jury, etc.*

United States Circuit Court for the District of Maine.

EBEN F. PILLSBURY *vs.* FARMINGTON VILLIAGE CORPORATION.

It is hereby stipulated and agreed by the parties to the above action that the same may be tried and determined by the court without the intervention of a jury, said parties hereby waiving a jury, but expressly reserving all right of exception in matter of law, and the right to carry the case forward by writ of error to the Supreme Court of the United States.

Portland.

CHARLES F. LIBBY,
Att'y for Plaintiff.
WEBB & HASKELL,
Att'ys for Defendant Corporation.

And now the said defendant corporation comes and defends, &c., when, &c., and says that it did not promise in manner and form as the plaintiff in his writ has declared against it, and of this it puts itself on trial.

By WEBB & HASKELL,
Its Attorneys.

And the plaintiff likewise.

By CHARLES F. LIBBY,
His Attorney.

And for a brief statement of the special matter to be used under and in addition to the general issue above pleaded, defendant corporation says:

First. That it denies that the plaintiff is the *bona fide* holder of the coupons in suit, and that the same are payable to him, but says that the same were placed in his hands merely for the purpose of bringing a suit thereon in this court.

Second. That defendant corporation is not, and never was,
20 an incorporated city, town, or plantation, but is, and always has been, merely a part of the town of Farmington, incorporated for local purposes, and under the constitution of Maine did not have any authority to issue the coupons in suit.

That before any of said coupons were issued ten residents and taxpayers in defendant corporation filed their bill in equity in the supreme judicial court for the State of Maine, held at said Farmington, against defendant corporation and others, complaining that said corporation were illegally about to issue bonds of defendant corporation with the coupons aforesaid annexed, and praying that the issue

of the same might be enjoined, of which bill of complaint defendant corporation, its officers and agents, and others defendants therein were duly notified and agreed that the same should be heard on bill and agreed statement, without answer, and that thereafterwards, on the fifth day of August, 1872, said bill was dismissed without prejudice.

That thereafterwards, on the twelfth day of August, 1872, a second bill of complaint was filed by ten residents and taxpayers in defendant corporation in said supreme judicial court, at said Farmington, against defendant corporation and others, complaining that a certain contract, dated April 15, 1870, between defendant corporation and the Androscoggin Railroad Company, stipulating for aid to be given by defendant corporation to said railroad company, was made without authority of law and void, and that they believed the officers of defendant corporation were then about to issue scrip of defendant corporation to the amount of thirty-five thousand dollars to raise money for the purposes stated in said contract,
21 in violation of the constitution and laws of this State, and praying that defendant corporation and its officers might be enjoined from issuing said scrip, and that defendant corporation and the other defendants be enjoined from enforcing said contract.

That said bill was duly served on all the defendants therein, who appeared and made answer to said bill, and, after considering the cause, the court, on the twenty-seventh day of August, 1878, passed a final decree in said cause, and perpetually enjoined the defendants in the same from enforcing said contract, as the same was void, and from issuing said scrip according to the terms thereof, and on the seventeenth of March, 1879, rendered final judgment therein.

Third. That on the fifth day of October, 1872, a third bill of complaint was filed in said supreme judicial court, held at said Farmington, by more than ten tax-payers and residents in defendant corporation, complaining that the contract aforesaid was made without authority of law and void, and that defendant corporation illegally had issued a part of said scrip, and that defendant corporation, pursuant to its vote, was about to assess upon the polls and estates of the inhabitants therein a tax, and enforce the collection thereof, and illegally apply the same to the payment of the scrip and interest coupons thereon, being a part of the indebtedness incurred under said contract in violation of the constitution and laws of this State, and praying that defendant corporation and its officers be enjoined from assessing and collecting said tax, and from paying any money from the treasury to the defendant corporation in the premises.

22 That said last-named bill was duly served on all the defendants therein, who appeared and made answer thereto, and, after considering the cause, the court, on the twenty-seventh day of August, 1878, passed a final decree perpetually enjoining the defendants in that cause, this defendant corporation and others, its officers and agents, from assessing and collecting said tax, and from paying any of the scrip or bonds and coupons thereof of defendant corporation issued or negotiated, or intended to be issued or negotiated, for

the purpose of aiding in the extention of the Androscoggin railroad, or paying wholly or in part the cost of such extention within and near the limits of said defendant corporation.

And the defendant corporation further says that the coupons in suit, and the bonds from which they were cut, were issued for the purposes named in the contract aforesaid without authority of law, and in violation of the judgments aforesaid of said supreme judicial court of the State of Maine, having jurisdiction of the parties and the subject-matter aforesaid, and that the original holders and purchasers of these bonds and coupons, and all intermediate holders thereof, and the plaintiff also, had lawful notice of the illegality of the same before the same were issued, and that the judgments of said supreme judicial court, as aforesaid, are conclusive and binding upon the parties to this cause, and that said coupons are illegal and void.

And on the eighth day of June, in the year of our Lord one thousand eight hundred and eighty-one, said cause came on to be
23 heard before the Honorable John Lowell and the Honorable Edward Fox, justices, and by written agreement of parties filed in the case a jury is waived, and the cause is to be tried and determined by the court without the intervention of a jury, with all rights of exception reserved.

Upon the hearing of the cause the court finds the following facts:

The writ is dated July 1, 1880.

Farmington is a duly incorporated town in the county of Franklin and State of Maine, containing a territory of about 35,000 acres, and about 3,300 inhabitants. By a special act, approved Feb'y 24, 1860, entitled "An act to incorporate the Farmington Village Corporation," "the territory in the town of Farmington, comprising front lots, number twenty-three, twenty-four, twenty-five, twenty-six, and twenty-seven on the east side of Sandy river, together with the inhabitants thereon, is hereby created a body politic and corporate by the name of Farmington Village Corporation, with all rights and privileges provided by the general laws of the State relating to corporations." Said village corporation by the same act was authorized and vested with power to raise money to support a police, and all other necessary regulations for the better security of property and the promotion of good order and quiet within its limits, to purchase fire engines and other apparatus for the extinguishment of fires, to construct reservoirs and aqueducts, erect engine-houses, and maintain a fire department; and for these purposes to assess the
24 property and polls within the territory aforesaid.

The act of incorporation was duly accepted.

The territory and inhabitants thus incorporated into a village corporation still continued to be a portion of the territory and inhabitants of the town of Farmington, including about 480 acres and 1,200 inhabitants.

The Androscoggin Railroad Company, duly chartered, had, prior to 1870, constructed and put in operation its railroad to a point in the town of Farmington on the west side of Sandy river, outside and

about one mile distant from the village corporation, and there had established freight and passenger stations.

From these stations to the village corporation was a highway and bridge leading across the river, and maintained by the town.

February 1, 1870, by a special law, the Androscoggin R. R. Co. was authorized to extend its railroad "from any point on said railroad in the town of Farmington to any other point in the town of Farmington, and to locate, construct, maintain, and use the same."

February 1, 1870, the following private statute was passed by the Legislature of Maine, viz:

SEC. 1. The Farmington Village Corporation may at any legal meeting, duly notified and called for that purpose, raise by tax or loan such sums of money as said corporation shall deem expedient, not exceeding thirty-five thousand dollars, and may appropriate the same in such manner and on such terms as said corporation shall determine, to aid in the extension of the railroad now operated by the Androscoggin Railroad Company to some point within or near the limits of said village corporation; Provided, That two-thirds of the legal voters present and voting at such meeting shall so vote.

25 SECT. 2. The said Farmington Village Corporation is hereby authorized and empowered to make such contracts with the Androscoggin Railroad Company for the purpose mentioned in the preceding section, as the said village corporation may determine, and may raise money by tax or loan to carry the same into effect, not exceeding, however, the amount named in the preceding section.

SECT. 3. The assessors and treasurer of said village corporation, upon being authorized so to do by a vote of said corporation, may issue the scrip of said corporation to such an amount, not exceeding thirty-five thousand dollars, as said corporation may determine, in certificates not less than one hundred dollars each, and payable in such number of years from their date as said corporation may determine, with interest at the rate of six per centum per annum, with semi-annual coupons attached thereto, the said scrip to be signed by the said assessors and treasurer, but the coupons shall be signed by the treasurer only.

SECT. 4. This act shall take effect when approved.

This act was approved February 1, 1879. At a legal meeting of the Farmington Village Corporation, duly notified, and held on the twenty-first day of February, 1870, of the legal voters of the corporation, it was voted by yeas and nays—one hundred and forty-six yeas and three nays—"To aid in the extension of the railroad operated by the Androscoggin Railroad Company, and to raise by loan the sum of thirty-five thousand dollars, and appropriate the same, or so much thereof as shall be necessary, to procure said extension; and that Francis G. Butler, Hannibal Belcher, and Samuel Belcher be authorized and directed, for and in behalf of the corporation, to contract with said railroad company for said extension, its

26 further operation and maintenance, and for the erection of all suitable buildings, in such manner and upon such terms

as they shall deem equitable and for the interests of the corporation, and to apply so much of the loan herein provided for as may be required to carry said contract into full effect."

At the same meeting it was voted nearly unanimously, one person only dissenting and voting nay, "to authorize and direct the assessors and treasurer to issue the scrip of the corporation in the manner provided by law to an amount not exceeding thirty-five thousand dollars, the principal of said scrip to be made payable as follows: Fifteen thousand dollars in ten years, five thousand dollars in fifteen years, five thousand dollars in twenty years, five thousand dollars in twenty-five years, and five thousand dollars in thirty years from July 1, 1870, with interest semi-annually from said July 1, 1870."

And at the same meeting it was voted, one vote only being in the negative—

"That the assessors and treasurer be authorized and directed to deliver said scrip to said Francis G. Butler, Hannibal Belcher, and Samuel Belcher, in such sums and parcels as they may require, taking their receipts therefor, and that said Butler, H. Belcher, and S. Belcher be authorized and directed to sell and dispose of the same for the purpose of filling any contract or contracts they may make with said railroad company."

Upon the 15th day of April, A. D. 1870, the said Francis G. Butler, Hannibal Belcher, and Samuel Belcher, as the committee for and in the name of the Farmington Village Corporation, on
27 the one part, and the Androscoggin Railroad Company, on the other part, executed a written contract whereby the said railroad company contracted and covenanted that it would, on or before the second day of March, A. D. 1871, construct and finish an extension of the railroad operated by said company from the then existing depot grounds of said railroad on the westerly side of Sandy river, in Farmington, across Sandy river, to some point on the easterly side of the creek near Hiram B. Stovell's barns, within the limits of said Farmington Village Corporation, in suitable and thorough manner, for the safe passing and repassing of passenger and freight trains, and would, at the eastern terminus of such extension, erect suitable buildings for depots and other purposes, to cost not less than nine thousand dollars, and thereafter to maintain and keep in repair said extension, depots, and other buildings, and thereafter to operate the extension in connection with their railroad then operated by them, with their regular trains, in a faithful and business-like manner, with all due regard to the public interests and the interests of said village corporation; also, to transport freight and passengers to and from the depot so to be erected in the limits of said village corporation at the same rates as to and from any other point in the town of Farmington. And the said village corporation on its part contracted and covenanted well and truly to pay or cause to be payed to said Androscoggin R. R. Co. the sum of fifteen thousand dollars, as follows, viz: One-fourth part thereof when said work should be one-fourth completed; one-fourth part when work should be half completed; one-fourth part when the work should be three-

fourths completed, and the remaining fourth part when said
28 work should be fully completed and finished; also, to pay the land damages for the location of said railroad extension and for the necessary depot grounds, said depot grounds not, however, to exceed four acres of land.

Bonds of the village corporation were prepared and signed by the assessors and treasurer to be used for the purpose of carrying out the contract thus made between the railroad company and the village corporation to an amount not exceeding the sum necessary for the performance of that contract on the part of the village corporation, and less than the full sum of thirty-five thousand dollars, named in the empowering act of the Legislature. Those bonds and the coupons annexed to the same were all in the form following:

State of Maine. Farmington Village Corporation.

No. ——. Funded Debt. No. ——.

Be it known, that the Farmington Village Corporation will pay at the office of the treasurer of said corporation to the holder of this bond ——— dollars in —— years from the date hereof; and will also pay at the same place the —— semi-annual coupons hereto attached as they shall become due, value received.

In witness whereof, we, the assessors and treasurer of said Farmington Village Corporation, in the name and in behalf of said corporation, by virtue of authority vested in us for this purpose by a vote of said corporation passed on the twenty-fifth day of February, A. D. 1870, have hereunto set our hands July 1, A. D. 1870.

S. H. LOWELL,
ROBT. McCLEERY,
F. C. PERKINS,
Assessors of Farmington Village Corporation.

29 E. G. BLAKE, *Treasurer.*

Bond No. ——. Funded Debt. Coupon No. ——.

The Farmington Village Corporation will pay ——— dollars on this coupon on the first day of ———, A. D. ——, at the office of the treasurer of said corporation.

E. G. BLAKE, *Treasurer.*

The bonds were signed as above by the assessors and treasurer of the corporation, and the coupons by the treasurer.

All the bonds so prepared and signed were dated July 1, 1870. The coupons bore no date, but were made payable at intervals of six months from July 1, 1870, on specific dates mentioned in the body of each.

The bonds with coupons annexed, so prepared and signed by the assessors and treasurer, were delivered to the committee named in the vote of February 21, 1870, in installments as follows:

July 18, 1870, thirty-eight fifteen-year bonds for one hundred dollars each, amounting to	$3,800
August 20, 1870, twelve 15-year bonds for one hundred dollars each, amounting to	1,200
And two 20-year bonds for $500 each, amounting to	1,000
Also sixteen 30-year bonds for $100 each, amounting to	1,600
February 6, 1871, eight 20-year bonds for $500 each	4,000
And ten twenty-five-year bonds for $500 each	5,000
July 3, 1871, six 30-year bonds for $100 each	600
November 8, 1871, five 30-year bonds for $100 each	500
November 18, 1871, two 30-year bonds for $100 each	200
January 25, 1872, one 30-year bond for $100	100
November 18, 1872, twenty 30-year bonds for $100 each	2,000
Total, one hundred [and] twenty bonds, amounting to	$20,000

30 With coupons annexed.

Prior to the delivery of any bonds to this committee a paper was prepared as follows:

"FARMINGTON, *June* —, 1870.

"The subscribers agree to take and pay for bonds, with coupons attached, issued or to be issued by the Farmington Village Corporation, to the amounts set against their respective names, paying for said bonds their par value on or before the first day of September next. Value received."

To this paper, which was signed in June, but at dates which do not appear, but before the committee issued any bonds, nineteen persons subscribed for bonds, amounting in the aggregate to thirty-nine hundred dollars. Of this amount of $3,900 fourteen hundred dollars was subscribed by the committee, to wit:

F. G. Butler, ten hundred dollars	$1,000
Samuel Belcher, two hundred dollars	200
Hannibal Belcher, two hundred dollars	200
	$1,400

The Androscoggin Railroad Company, in compliance with its contract, located and constructed the extension of its railroad, erected depots and other necessary buildings within the limits of the village corporation, and in all respects fully performed its covenants and agreements in a reasonable time, the last quarterly payment of $3,950 under the contract being made to the railroad company Feb. 15, 1871, the other payments being made July 18, Aug. 24, and Nov. 24, 1870.

The committee disposed of the bonds delivered to them, as before stated, by the assessors and treasurer of the corporation, at the dates and in manner following, viz:

31 July 18, 1870. Deposited with Sandy River Bank, located and doing business in Farmington village, bonds to amount

of $3,800, on which the bank advanced $3,750, and on the 30th of the same month they were sold to the bank for the sum already advanced.

Aug. 20, 1870. Sold and delivered to sundry persons, principally the subscribers to the paper of June, 1870, bonds to amount of $38,000, for $2,200 of which they received cash, and for $1,600 of which they took notes, which were discounted at Sandy River Bank, these bonds producing $3,742 in cash.

Feb. 6, 1871. Deposited bonds to the amount of $9,000 with T. F. Belcher, cashier of the Sandy River Bank, in trust, as collateral security to indemnify the signers of two notes signed by citizens and members of Farmington Village Corporation, given to raise money to perform the village corporation's contract with the railroad company, viz:

Note dated Nov. 9, 1870, for $3,900, signed by F. G. Butler and forty-four others; and one note dated February 6, 1871, for $3,750, signed by F. G. Butler and fifty-one others.

February 15, 1871. Sold one $100 bond.

May 10, 1871. Another note of that date was signed by F. G. Butler and eleven others for the sum of $540, and discounted by the Sandy River Bank, secured by the $9,000 bonds then held in trust by T. F. Belcher under the arrangement of Feb. 6, 1870.

July 3, 1871. Bonds to the amount of $600 were deposited with the clerk of the county commissioner as security for land damages claimed by G. Drake.

Nov. 8, 1871. Bonds to the amount of $500 were deposited with clerk of said commissioners as security for land damages claimed by Moses and Eliza Perham.

Nov. 20, 1871. Bonds to the amount of $200 were given in
32 substitution for a like amount accidentally mutilated; the mutilated bonds were part of those sold Aug. 22, 1870.

Nov. 18, 1872. Bonds to the amount of $2,000 were sold to sundry persons, $1,000 of same for cash, and $1,000 of same for the notes of the purchasers.

Every purchaser, except two or three, who bought a few $100 bonds, was a citizen of the town of Farmington, and a member of the village corporation. The Sandy River Bank was located and carried on its banking business in the village corporation.

The signers of the three notes discounted by the bank and secured by the deposit of $9,000 of the bonds as collateral, were all citizens and members of the village corporation.

Those notes were not paid at maturity, but remained in the bank until some time in 1875 or 1876, when the bank, insisting on payment, the signers took up their notes and divided among themselves in the proportions that they had contributed to the notes, the whole of the $9,000 collaterals. The $1,100 which were deposited with the clerk of the county commissioners as security for land damages, were delivered to F. G. Butler, upon his advancing the sum of $997.80 cash, to pay the commissioners' award of damages, and he has retained them as his security for the money he has so advanced.

On the 27th day of June, 1870, before the committee had received any of the bonds from the assessors and treasurer of the village corporation and prior to July 1, 1870, on which day all the bonds bear date, Jonas Burnham and eleven others, all citizens, owners of property subject to taxation, and tax-payers in the village corporation, filed a bill in equity in the supreme judicial court for
33 the State of Maine, in Franklin county, being the county in which said village corporation is situated, against the Androscoggin R. R. Co, the assessors and treasurer of the village corporation, and F. G. Butler, Hannibal Belcher, and Samuel Belcher, the committee before named, complaining of the action of said railroad company and of the village corporation, its assessors and treasurer, and of its aforesaid committee, that the notes, contracts, covenants, and undertakings between said village corporation and said railroad, and all action taken and proposed on the part of said village corporation, its officers and committee, were without authority of law and void, and injurious to the rights and interests of said complainants and praying that an injunction should be issued from said court enjoining said village corporation, its assessors and treasurer from signing and issuing any scrip or securities of said village corporation, and the said committee from negotiating any scrip or securities of said village corporation issued or to be issued for the purposes aforesaid, and from carrying out the provisions of the contract entered into by them on the part of said corporation April 15, 1870. And that said railroad company, its president and directors, be enjoined from enforcing or attempting to enforce said contract against the village corporation, and for process and further relief

On the same 27th of June, 1870, one of the justices of said court issued an order of notice for a hearing on the application for a temporary injunction, to be had at the court-house in Farmington, in the county of Franklin, on the 15th day of July, A. D. 1870, which order was duly served on one of the assessors and the treasurer of the village corporation and on F. G. Butler, Hannibal Bel-
34 cher and Samuel Belcher, the committee, and on the president and clerk of the railroad company by copy of the original bill and the order of court thereon, given to each in hand on June 30, 1870.

On the return day of said notice, to wit, July 15, 1870, the several parties appeared by their respective solicitors at the court-house in Farmington and within the limits of the village corporation, and there entered into an agreement of record to submit the said cause to the decision of the full court sitting as a court of equity at the July term, 1870, which was to commence a regular term at Portland on the 19th day of July, 1870, upon an agreed statement of facts without answer or plea, and that the cause should be argued within three weeks from said 15th day of July, 1870, or decided on an *ex parte* hearing. If the complainants on the facts agreed were entitled to the relief claimed, then such decree as equity required to be entered, otherwise bill to be dismissed with or without costs as court should determine. No injunction preliminary or other issued.

The case was duly entered at the July term, 1870, and argued, and continued for advisement, and on the third of August, A. D. 1872, the court entered its decree, as follows: "Bill dismissed without prejudice; no costs for either party by agreement."

And by the clerk of the full court on the 5th day of August, 1872, was duly certified to the clerk of courts in Franklin county, and by him recorded.

At the date of filing of this bill in equity, the Revised Statutes of Maine, Ch. 77, Sect. 5, subdivision 9, provided: "When counties, cities, towns, or school districts, for a purpose not authorized by law, vote to pledge their credit or to raise money by taxation or
35 to pay money from their treasury, or for such purpose any of their officers or agents attempt to pay out such money, the court shall have equity jurisdiction on application of not less than ten taxable inhabitants therein."

By an act approved Feb. 22, 1872, this statute was amended by striking out the word "or" in the first line and inserting after the word "districts" the words "village, corporations, or other public corporations by whatever name."

And after the decision of the court above stated was received, to wit, on the 12th day of August, 1872, Jonas Burnham and thirteen others, all residents of the town of Farmington, and of the Farmington Village Corporation, tax-payers in said town and village corporation and owners of property subject to taxation in said town and corporation, filed in the office of the clerk of the supreme judicial court of Maine, in Franklin county, their bill of complaint in equity, duly sworn to, against the said village corporation, its assessors and treasurer, and F. G. Butler, Hannibal Belcher, and Samuel Belcher, the committee before-mentioned, also against the Androscoggin Railroad Company, wherein said complainants complained of the votes of said town before recited, and the contract made by the committee with the railroad company, and of the issue, or proposed issue, of scrip or bonds of the corporation and that the same were all in violation of the constitution of the State, illegal and void, and prayed an injunction enjoining said village corporation, its assessors and treasurer, from signing or issuing any scrip or securities of said village corporation, and said committee from negotiating any of the scrip or securities of said corporation, or any part thereof issued, or to be issued, for the purpose
36 aforesaid, and from carrying out the provisions of the contract entered into by them on the part of the corporation on the 15th day of April, 1870, and the railroad company from enforeing or attempting to enforce the said contract and for other relief.

Thereupon, on the same 12th day of August, A. D. 1872, a subpœna issued to the several respondents in said bill of complaint named, returnable on the fourth Tuesday of September, 1872, and the same was served by a duly qualified officer upon said village corporation and upon its assessors and treasurer, and on all the members of said committee, on the same 12th day of August, 1872, by copies of bill and subpœna given to each assessor, and to the treasurer, and to each member of the committee; it was also served

on the railroad company. No preleminary injunction was granted or issued.

And said village corporation duly filed its answer to said bill, and the railroad company filed its demurrer, and the case was duly prepared for a hearing at the July term, 1873, and was then heard by the court, and after hearing was continued for advisement till the twenty-seventh day of August, 1878, when a decree was entered sustaining said bill granting an injunction as prayed for with costs for complainants.

The opinion of the court in that case is reported in the 70th volume of Maine Reports, at page 515, under the name, Dyer *et als. vs.* Farmington Village Corporation, and holds the statute authorizing the village corporation to aid the extension of the railroad, unconstitutional and void.

37 This opinion was concurred in by only four of the eight judges composing the court, a fifth, who had sat in the cause, having died while the opinion was in his hands for examination, and his death made the four judges a majority of the court.

At a legal meeting of the Farmington Village Corporation, duly warned and notified, held on the 27th day of January, A. D. 1872, it was voted: "To raise the sum of $1,200 to pay the indebtedness of the corporation for coupons now due, and to pay for all such coupons becoming due on July 1, 1872." These were coupons on the bonds already mentioned.

At a legal meeting of said corporation, duly warned and notified, held September 28, 1872, it was voted: "To raise by direct tax, the sum of $3,350 to pay outstanding indebtedness of said corporation." At the same meeting it was also voted, "That the assessors be instructed to assess and commit said tax for collection immediately."

After said meetings, to wit, on the third day of October, A. D., 1872, seventeen residents and tax payers commenced proceedings in equity to restrain the village corporation, the assessors, collector, and treasurer of said village corporation from assessing and collecting and receiving the tax so voted, and from paying out any and all sums of money voted as aforesaid, and that shall hereafter be voted for such purpose.

The complainants, on the fifth day of October, 1872, filed a bond approved by the court, and thereupon on said fifth day of October, a temporary injunction as prayed for in the bill, was granted, but no evidence of service of the same was offered. A subpœna was issued, returnable November 15th, 1872, at which time the

38 several respondents appeared and answered.

The cause came on to be heard on bill, answer and replication, at the July term, 1873, and was thence continued for advisement till the 27th day of August, 1878, the temporary injunction having in the meantime been continued in force; and on the said 27th day of August, 1878, the court entered its decree as follows, viz: "This court doth order and decree that a perpetual injunction be awarded to restrain the Farmington Village Corporation and its officers and agents, by whatsoever title or name, from paying any of the scrip or bonds and coupons thereof of said corporation, issued

and negotiated, or intended to be issued and negotiated, for the purpose of aiding in the extension of the Androscoggin railroad, or paying wholly or in part the cost of such extension within and near the limits of said village corporation; also that a perpetual injunction be awarded to restrain said village corporation and its officers, and particularly the assessors, collector, and treasurer thereof, and their successors in office, from assessing, collecting, receiving, and paying out any and all sums of money voted by a vote or votes passed on the 27th day of January, A. D. 1872, or subsequent to that time, or that shall hereafter be voted by said village corporation, for the purpose of paying or meeting directly or indirectly any indebtedness or apparent indebtedness, including the scrip or bonds and coupons above-named of said corporation, on account of said railroad extension, and the land damages for the location thereof, and for necessary depot ground," and also decreed for costs to said complainants. Coupons on the bonds issued as before stated, to the amount of $513, were paid to the holders by the treasurer of
39 the village corporation in 1871, and to the amount of $135 in the year 1872, prior to August 12.

The population of Farmington, on the east side of the river, is about 2,400, of which about 1,200 are in the limits of the village corporation.

The valuation of the village corporation and of the town in 1860, 1870, and 1880 is as follows:

1860, village, $223,897; town, $709,000.
1870, village, 292,199; town, 877,770.
1880, village, 604,270; town, 1,523,000.

The figures for 1880 are based on a full valuation; the others on a half valuation. The town valuation includes the village valuation.

The polls in the village corporation were:

In 1861, one hundred and thirty-one.
In 1870, two hundred and eleven.
In 1880, two hundred and seventy-eight.

In the town they were:

In 1861, about five hundred and seven.
In 1870, upwards of seven hundred.
In 1880, eight hundred and fifty-three.

The coupons in suit were collected from various holders of the bonds, all residents of Farmington and citizens of the State of Maine, about May, 1880, and transferred to the plaintiff separate from the bonds.

Plaintiff gave his note and agreement for these coupons to the agent of the holders, who had taken them to dispose of, as follows:

"$500. "Boston, *May* 5, 1880.

"For value received, I promise to pay P. Dyer five hundred dollars in two years, with interest.

"E. F. PILLSBURY."

40 "Boston, *May* 5, 1880.

"Whereas I have this day bought of P. Dyer, of Farmington,

coupons of the Farmington Village Corporation to the amount of $7,922, and given him my note for $500 for the same; as a further consideration for said coupons I agree that, if I succeed in collecting the full amount of said coupons, I will pay him fifty per cent. of the net amount collected above said five hundred dollars, and pay him as soon as I collect the money from said corporation.

"E. F. PILLSBURY."

F. G. Butler, chairman of the committee to negotiate the bonds, was at same time a director of the Sandy River Bank.

All the money received from the bonds sold or from notes to which they were collateral was faithfully and honestly applied to the extension of the railroad, payment of land damages, and for depot grounds.

The extension of the railroad has proved of great benefit to the village corporation, and the increase in its valuation since it was constructed has largely exceeded the rate of increase of the rest of the town.

And upon the facts thus found the cause was then and there fully argued by counsel, and upon such hearing the following questions arose, and upon the same the judges were divided and opposed in opinion, to wit:

1. Whether the plaintiff can maintain an action in this court upon the coupons declared upon, the bonds or instruments to which
41 they were attached not being assigned to him, but having been issued to and always held by citizens of Maine.

2. Whether the decision of the supreme judicial court of Maine, in Joseph Dyar *et al. v.* Farmington Village Corporation, reported in the seventieth volume of Maine Reports, should control the decision of this court in this action.

3. Whether the said act of the Legislature of Maine, authorizing the defendant corporation to make and issue the above-mentioned bonds and coupons for the purposes aforesaid is a valid and constitutional act under the provisions of the constitution of said State of Maine; and whether the bonds issued by the defendant under said act were valid and obligatory contracts.

The said judges therefore hereby state the said questions and certify the same, and direct that the certificate thereof be entered of record.

JOHN LOWELL,
Circuit Judge.
EDWARD FOX,
District Judge.

In accordance with the law in this behalf, the presiding justice states that he is of opinion as follows:

1. That the plaintiff may well maintain his action to recover the contents of said coupons in this court.

2. That the said decision of the supreme judicial court of Maine is not conclusive.

3. That the said bonds and coupons are valid and obligatory upon the defendants.

It is therefore ordered by the court, to wit, on the ninth day of June, in the year of our Lord one thousand eight hundred and eighty, that judgment be entered for the plaintiff for the amount claimed. All which being seen and understood, it is there-
42 fore considered by the court here that the said plaintiff recover of the said defendants the sum of ten thousand four hundred and eight dollars and thirty-five cents ($10,408.35) debt or damage, and his costs of suit, taxed at one hundred and thirty-three dollars and five cents ($133.05).

And thereafterwards, on the fifth day of April, in the year of our Lord eighteen hundred and eighty-two, the said Farmington Village Corporation filed the following bond, duly approved and allowed by the Hon. John Lowell, judge of the circuit court of the United States for the first judicial circuit, to wit:

Bond.

43 Know all men by these presents, that we, The Farmington Village Corporation, a body corporate and public, created by the laws of the State of Maine, as principal, and James P. Russell and Frank J. Austin, both of Farmington, in said State, as sureties, are held and firmly bound unto Eben F. Pillsbury, of Boston, in the county of Suffolk and State of Massachusetts, a citizen of that State, in the full and just sum of two hundred dollars, to be paid to the said Eben F. Pillsbury, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated, this fifth day of April, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately, at a circuit court of the United States for the first circuit, held at Portland, Maine, within and for the district of Maine, in a suit depending in said court between said Eben F. Pillsbury, the plaintiff, and said Farmington Village Corporation, defendant, judgment was rendered against the said Farmington Village Corporation, and the said Farmington Village Corporation having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Eben F. Pillsbury, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Farmington Village Corporation shall prosecute said writ of error to effect, and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

FARMINGTON VILLAGE
CORPORATION, [L. S.]
By FRANK J. AUSTIN,
JAMES P. RUSSELL,
DANIEL BEEDY,
Its Assessors, duly authorized.
JAMES P. RUSSELL. [L. S.]
FRANK J. AUSTIN. [L. S.]

Sealed and delivered in presence of—
J. P. SYLVESTER.

Approved by— JOHN LOWELL,
Circuit Judge of the United States
for the First Judicial Circuit.

A true copy of the original bond on file.
Attest: A. H. DAVIS, *Clerk.*

44 UNITED STATES OF AMERICA, }
District of Maine, } *ss:*

I, A. H. Davis, clerk of the circuit court of the United States for the district of Maine, do hereby certify that the foregoing is a true transcript of the record and of all proceedings in the cause Eben F. Pillsbury *v.* The Farmington Village Corporation, therein named, as the same appears of record and on file in my office.

Witness my hand and the seal of said circuit court, this twentieth day of April, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] A. H. DAVIS,
Clerk of the Circuit Court of the United States, District of Maine.

Endorsed on cover: Maine C. C. U. S. No. 199. The Farmington Village Corporation, plaintiff in error, *vs.* Eben F. Pillsbury. Filed 25th April, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A.D. 1884.

No. 199.

THE FARMINGTON VILLAGE CORPORATION,

PLAINTIFF IN ERROR,

vs.

EBEN F. PILLSBURY,

In error to the Circuit Court of the United States for the District of Maine.

Abstract, Assignment of Errors and Points for Plaintiff in Error.

BY WM. L. PUTNAM.

B. Thurston & Co., Printers, Portland, Me.

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ABSTRACT.

2 This case arises upon coupons of the Farmington Village Corporation, in the State of Maine, a corporation composed of a small portion of the town of Farmington, as shown in the record, folios 23, 24 and 39, issued with bonds in accordance with the act of February 1st, A.D. 1870, given in folios 24 and 25, for the purpose of extending a railroad from its

terminus, then existing in a part of the town of Farmington outside of the Village and on the other side of the river from the Village, across the river into the Village.

3 The purposes for which the Village was incorporated, ~~is~~ are shown by the recitals from the act of incorporation, folio 23; they were only to support a police, secure good order and quiet, and provide for the extinguishment of fires, ~~and for no other purposes.~~

In contradistinction from the principle upon which towns and plantations are organized within the State of Maine, the corporation was not organized for the purpose of constructing roads, nor had it any authority over the roads within its limits; nor for the general purposes for which towns and plantations are organized, nor had it any authority for said general purposes.

4 The construction of a railroad was not akin to any of the purposes for which it was organized.

It appears, folio 39, that the whole number of polls in the Village ~~at that time~~ was two hundred and eleven (211), of which one hundred and forty-six (146) voted at the meeting in favor of aiding the railroad corporation, as appears, folio 25.

This meeting was held on the 21st day of February, A.D. 1870, folio 25; but it appears by folios 32 to 37, that, commencing on the 27th day of June, A.D. 1870, which was before the committee had received any of the

bonds from the assessors, and before any of the bonds had been issued, a minority of the citizens and
5 owners of property subject to taxation and tax payers in the Village corporation, commenced and prosecuted continuously legal proceedings to restrain the issue of bonds, which proceedings culminated in the decision of the Supreme Judicial Court of the State of Maine rendered on the 27th day of August, A.D. 1878, granting an injunction and holding that the statute of February 1st, A.D. 1870, was unconstitutional and void, according to the opinion of the court which is reported in 70 Me. Reports, p. 515, in the case of Dyer et als. v. the Farmington Village Corporation.

It appears, folio 37, that this opinion was
6 rendered by ~~a divided court, securing the concurrence of~~ only four of the eight judges composing the court; one of the judges who had sat in the court having died while the opinion was in his hands for examination, and his death making four a majority of the court as it then existed.

The bonds were issued notwithstanding the pendency of the litigation. A description of them appears, folio 29. A portion of them was sold in the manner and at the date shown by folios 31 and 32. A portion of them, as appears by the same folios, was deposited by the Village corporation as collateral security as
7 follows:

January 1st, A.D. 1871, eighteen (18) of the twenty (20) five hundred ($500) dollar bonds, July

3d, A D. 1871, bonds to the amount of six hundred (600) dollars, being all one hundred (100) dollar bonds, and November 8th, A.D. 1871, bonds to the amount of five hundred (500) dollars, being all one hundred (100) dollar bonds, were deposited as collateral, and the record does not show that the title to these bonds and the coupons attached thereto was ever changed; but on the other hand, so far as the record shows, the title to the bonds and coupons at-
8 tached thereto still remains in the Village corporation, subject to the liabilities for which they were pledged, which liabilities are stated in the record, folios 31 and 32.

The whole issue of bonds was nominally twenty thousand (20,000) dollars; two hundred (200) dollars of which, as appears by the record, were given November 20th, A.D. 1881, in substitution for a like amount mutilated, making the whole actual issue nineteen thousand eight hundred (19,800), and the amount so issued as collateral was ten thousand one hundred (10,100) dollars, being something more than one-half of the whole outstanding; and the bonds so issued as collateral were issued for an amount something less than the face of the bonds.

9 It appears, folio 32, that every purchaser except two or three who bought a few one hundred (100) dollar bonds, is a citizen of the town of Farmington and a member of the Village corporation.

The bank to which the nine thousand (9,000) dol-

lars of bonds were pledged on February 6th, A.D. 1871, was located and carrying on its banking business within the Village corporation; and the notes for which the bonds were pledged were discounted by the bank, and all the parties thereto were citizens and members of the Village corporation.

The other eleven hundred (1100) dollars of
10 bonds which were deposited as collateral were taken up by F. G. Butler upon his advancing the sum for which they were deposited; and he has retained them as his security for the money he so advanced, folio 32.

F. G. Butler, folio 26, was one of the Village committee.

It appears, folios 38 and 39, that none of the coupons attached to the bonds issued have ever been paid, except to the amount of five hundred and thirteen (513) dollars paid in A.D. 1871, and the amount of one hundred and thirty-five dollars paid in A.D. 1872.

11 Folios 39 and 40 show how Pillsbury, plaintiff in the court below, became possessed of the coupons; they were all collected from the various holders of the bonds, residents of Farmington and citizens of the State of Maine.

In consideration of receiving the coupons, the original plaintiff Pillsbury, gave his note of five hundred (500) dollars, dated May 5th, 1880, to P. Dyer, whom

the record states was the agent of the holders, which, of course, means the holders of the bonds; and on the same 5th of May, Pillsbury gave, in further consideration of receiving the coupons, his agreement to
12 Dyer, folio 40, as follows:

"As a further consideration for the said coupons, I agree that if I succeed in collecting the full amount of said coupons, I will pay him, Dyer, fifty (50) per cent of the net amount collected above said five hundred (500) dollars, and pay him as soon as I collect the money from said corporation."

The note which Pillsbury gave to Dyer was payable in two years with interest; therefore it appears that Pillsbury paid nothing in cash, and the whole transaction was of a collusive character.

Of the whole amount of coupons in suit in which judgment was rendered in the court below, those attached to the ninety-seven hundred (9700) dollars of bonds sold, less coupons paid as already stated,
13 amount to considerably less than one-half of the whole amount for which judgment was rendered. It is not necessary here to give the precise computations; because if the judgment was erroneous for including coupons attached to the bonds which were issued simply as collateral, it must be reversed and the court below will work out the necessary computations.

The claim sued, appearing folio 8 and sequence, included interest on the coupons; and the judgment in-

cluded interest on the coupons both for the period before the beginning of the suit, as well as for the period after, although the coupons, as appears by the
14 form of the coupon, folio 29, was issued at Farmington, and was payable there, within the State of Maine, and was therefore subject to the local law of the State of Maine, that interest is not allowable upon interest except by express stipulation.

The case was tried by the court without a jury, in accordance with the stipulation as shown, folio 23, and the record is made up of facts found by the court, as is further shown, folio 23; also upon folios 40 and 41 appear certain questions which arose in the case, and upon which the judges were divided and opposed in opinion. The opinion of the circuit judge being in favor
15 of Pillsbury upon those questions, judgment was rendered for him in the court below.

ASSIGNMENT OF ERRORS.

1 That the rule laid down by the Supreme Judicial Court of the State of Maine in the case of Dyer et als. v. the Farmington Village Corporation, 70 Me. Reports, p. 515, is law.

2 That no suit can be maintained against the Village Corporation, for the coupons attached to or severed from the bonds which have been issued by it as collateral, as already explained.

3 That the suit was brought in contravention of the 5th section of the Act of March 3, A.D. 1875.

4 That by the legal effect of the agreement of May 5th, A.D. 1880, if it is valid, Pillsbury holds an interest in common in the coupons with the original holders, who are all citizens of Maine; that they have therefore an undivided interest in the controversy with him, and have not so completely ~~assigned~~ transferred their interest as to give the Circuit Court jurisdiction.

5 That by the laws both of Maine as well as of Massachusetts, the arrangement as to Pillsbury, per folios 39 and 40, was illegal and void, so that he holds all the coupons subject to recall by citizens of Maine.

6 That as to the $1400 of bonds and coupons attached thereto owned by F. S. Butler, Hannibal Belcher and Samuel Belcher, the suits in Maine ~~were~~ was effectual as *lis pendens*.

It may be convenient to consider this assignment of errors in an order different from the order of numbering above.

POINTS.

Although the record states, folios 40 and 41, certain questions upon which the judges were divided and opposed in opinion, yet plaintiffs in error are not limited to the questions upon which the judges were so divided.

18 The amount involved in the case is in excess of five thousand (5,000) dollars; and the whole amount involved is in dispute, although there are subordinate controversies as to several and distinct portions of the whole amount.

Upon the points involved in the certificate the jurisdiction of the court would attach, whatever might prove to be the amount in dispute; but it appearing that the amount actually in dispute exceeds the five thousand (5,000) dollars, the certificate of division of opinion has become of no importance.

19 The statute of April 29, A.D. 1802, 2 Stat. p. 159, did not necessarily bring before this Court anything except the precise question certified; and that statute provided only for deciding the questions so certified, remitting the decisions to the Circuit Court to be there entered of record, and to have effect according to the nature of the orders of the Supreme Court.

Ward v. Chamberlain, 2 Black, p. 430.
Ogle v. Lee, 2 Cranch, p. 33.

And this proceeding did not preclude the parties from afterward sueing out a writ of error upon the final judgment, bringing the whole case before
20 the Supreme Court.

Ogle v. Lee, 2 Cranch, *ante.*

But inasmuch as the proceeding under the Act of A.D. 1802 did not absolutely prohibit the court below

from going on with the case, it might happen that the whole case would go before the Supreme Court together, as in Brobst v. Brobst, 2 Wallace, p. 96.

The present statute, Revised Statutes, sec. 693, says: "Any final judgment or decree . . wherein the judges certify . . . that their opinions were opposed . . . may be reviewed and affirmed, or reversed or modified by the Supreme Court on writ of error or appeal, according to the nature of the case;" and the practice of the Court seems to be to affirm or reverse as upon any ordinary writ of error.

U. S. v. Reese, 92 U. S., pp. 214-222.

If the case once goes to the Supreme Court under this section 693, and judgment is thereupon affirmed, it seems impossible to bring before the Court upon any subsequent or simultaneous writ of error, any questions whatever appearing upon the record.

Therefore it seems to follow inevitably that all questions arising upon the record are opened here; and that the counsel for the defendant in error, if he claims otherwise, overlooks the fact that the decisions applicable to the Act of A.D. 1802 are not applicable to the section of the Revised Statutes above referred to.

This record is made up, first of the declaration of the writ, folios 5 to 19, second, stipulation waiving a jury, folio 19, third, the pleadings of defendant, folios 19 to 23, all of which are in regular course parts of the

record, and therefore in connection with the judgment, folios 41 and 42, examinable upon writ of error. The balance of the transcript, namely folios 23 to 41, are special findings of the court, as appears by the statement in the record, folio 23, "that upon the hearing of the cause, the court finds the following facts."

23

Consequently, the whole transcript, from folios 5 to 42, is before this Court for examination, and is subject to the rule that "when the finding is special, the review by the Supreme Court upon a writ of error may extend to the determination of the sufficiency of the facts found to support the judgment. No bill of exceptions is required or is necessary to put upon the records the findings, whether general or special. They belong to the record as fully as do the verdicts of a jury. If the finding be special, it takes the place of a special verdict; and when judgment is entered upon it, no bill of exceptions is needed to bring the sufficiency of the findings up for review."

24

Insurance Co. v. Boone, 95 U. S., pp. 117 and 124.

Miller v. The Life Insurance Co., 12 Wallace, pp. 285 and 297.

Upon a writ of error after a bill of exceptions, the whole record is open to revision, whether appearing by the bill of exceptions, or in any other manner.

Suydam v. Williamson et al., 20 Howard, pp. 427 and 433.

Within a certain range this Court refuses to
25 take cognizance of questions not raised in the court below. What that range is we will not undertake to say, definitively. It includes questions coming from State Courts by force of the statute, questions arising in such way, that the party making them can be presumed to have waived them in the court below, and questions not vital to the case, and questions and points, which, if raised in the court below, could presumably have been met there and obviated. We do not understand, that it applies to questions vital to the case, which if brought to the attention of the court below could not have been obviated, but must
26 necessarily have resulted in a different judgment from that which was rendered.

We understand that we are sustained in this by Garland v. Davis, 4 Howard, pp. 131 to 143, Slacum v. Pomeroy, 6 Cranch, pp. 221 and 225, U. S. v. Amedy, 11 Wheaton, pp. 392 and 412, affirmed in Beaston v. the Farmers Bank of Delaware, 12 Peters, pp. 102 and 135, and by Insurance Co. v. Piaggio, 16 Wallace, p. 378, and Readfield v. the Iron Co., 110 U. S., p. 174.

We doubt the necessity of thus elaborating the point that the whole record is open to us; but we have been induced to do it, from our understanding that
27 defendant in error insists upon the opposite view.

B. We claim enough appears in the record to show that the parties were improperly and collusively

made in contravention of section 5 of the act of March 3, A.D. 1875.

This point can be taken under the Act of A.D. 1875, without a plea in abatement.

Williams v. Nottaway, 104 U. S., pp. 209 and 211.

See also Claflin v. Ins. Co., 110 U. S., p. 81, and some of the cases hereafter cited.

The Act of A.D. 1875 was specially careful "to
28 guard against the consequences of collusive transfers to make parties, and imposed the duty on the Court on its own motion, without waiting for the parties, to stop all further proceedings and to dismiss the suit the moment anything of the kind appeared"

Williams v. Nottaway, p. 211, *ante.*

On the fifth of May A.D. 1880, folios 39 and 40, these coupons amounting with interest to nearly ten thousand (10,000) dollars, some of them nearly ten (10) years overdue, were gathered together by Mr. Dyer as
29 agent of the various holders, who were all citizens of Maine, and transferred to the plaintiff, a citizen of Massachusetts, without any cash payment, in exchange for a note to Dyer of five hundred (500) dollars payable in two years, which note was expressly so made as not to be negotiable, being payable to Dyer and not to his order, and was accompanied with an agreement to pay Dyer fifty per cent

of the net amount collected above the five hundred (500) dollars.

This suit was brought on the first of July A.D. 1880, within less than two months after the alleged transfer to Pillsbury, folio 23.

30 The transaction on the face of the papers was such, that the Circuit Court should have dismissed the suit under the fifth section of the Act of A.D. 1875; and the action of the Circuit Court in not so dismissing the suit is revisable by this Court.

Williams v. Nottaway, *ante*.

Hayden v. Manning, 106 U. S., p. 586.

Hayden v. Manning, *ante*, was in equity where all questions, both of law and equity, were before this Court; but Williams v. Nottaway, *ante*, was at law brought up by writ of error, in which there had been no finding by the Circuit Court under the statute

31 to which we refer, but in which the whole of the evidence was embodied in the bill of exceptions.

C. Aside from the point that the parties were collusively made in contravention of the statute, our assignment of errors makes the further point that the transfer was only a partial one at the most; so that although the coupons were payable to bearer, the original cause of action did not entirely go out of the original holders of the coupons, who were citizens of Maine.

In other words, by the legal effect of the agreement given by Pillsbury of May 5th A.D. 1880,
32 folio 40, taken in connection with the whole transaction, he became agent for the original holders of one-half of the amount of the coupons in excess of the sum of five hundred (500) dollars; the relations of the parties in this respect are entirely different from what they would have been, if Pillsbury had acquired the bonds from some other source or at some previous time, and had then given the agreement which appears in the records; the transaction is to be taken altogether; the whole effect of it is, that the interest of one-half of the coupons in excess of the sum of five hundred (500) dollars
33 never passed out of the original holders; and inasmuch as the original holders could not maintain suit in the Circuit Court of the United States, they could not give that Court jurisdiction, by transferring to some other party, even if by a bona fide transfer, a co-tenancy or a quasi co-tenancy in property, although it be coupons payable to bearer.

We distinguish the case on this point from demands brought by a person who has a special property in the whole as a bailee or mortgagee; where undoubtedly, if he presents the proper citizenship, the Circuit Court may take jurisdiction, even though the bailor or
34 mortgagor could not go into that tribunal.

We also, by the same peculiar circumstances of this case, distinguish it from Bonnafee v. Williams,

3 Howard, p. 574, where the whole legal title was for good reasons vested in the trustee; though it might well be questioned whether Bonnafee
35 v. Williams, ante, where there appears to have been only a dry trust, would be law under the ~~second~~ fifth section of the Act of A.D. 1875, which, by using the words "really and substantially involve a dispute," apparently looks more at the essential relations of the parties than did the Judiciary Act.

We say, this was not a case where the entire interest was transferred, receiving back a mere agreement to pay money, because there was no formal written transfer of the coupons; they were simply deposited in the possession of Mr. Pillsbury, so that the transfer did not necessarily imply a transfer of
36 title; the agreement from Pillsbury back was not to pay a sum equal to fifty (50) per cent of what may be received net, but was to pay "fifty (50) per cent of the net amount collected above the said five hundred (500) dollars;" and the whole transaction is of such a nature, that we suppose in case Pillsbury should succeed, a Court in equity could in case of necessity restrain him from diverting the net proceeds of collection, and compel him to deliver to Dyer, Dyer's specific portion, whatever ~~they~~ it might be.

Therefore we say, that as a part of the interest remains in Dyer's constituents, and the coupons
37 are payable to bearer, so that the legal title follows the equitable interest, there remains es-

sentially a joint right of action; and the demand does not "substantially involve a controversy properly within the jurisdiction of the Circuit Court."

D We claim that the whole transaction with Pillsbury was in contravention of the criminal laws both of Maine and Massachusetts, and a case of champerty.

The Revised Statutes of Maine of 1883, Chap. 122, Section 12, provide "whoever brings, prosecutes or defends or agrees to bring, prosecute or defend any suit at law or in equity upon shares, shall be punished by fine not exceeding one thousand nor less than twenty dollars, or by imprisonment for not more than
38 one year."

Notwithstanding the law in some other States is otherwise, and notwithstanding champertous agreements with attorneys at law seem to have the approval of the Supreme Court of the United States, this statute is only in affirmation of the common law of Maine and Massachusetts, in each of which States the old rules against champerty are strictly upheld.

Ackert v. Barker, 131 Mass., p. 436.

39 There being no moral turpitude here, we think it can hardly be doubted that the parties whom Dyer represents, can rescind the whole arrangement before the proceeds of collection come into the hands of Pillsbury, according to the principles explained in White v. Franklin Bank, 22 Pickering, pp. 181 and 189, and liberally applied in many later cases.

Therefore it follows that the original plaintiff, Pillsbury, has no indefeasible interest whatever in the coupons in suit.

We suppose that this would not enable the Village Corporation to defeat Pillsbury's suit, if the
40 question was merely one of right of action, but we claim that it may be availed of by us upon the question of jurisdiction.

To illustrate: If the coupons originally belonged to citizens of Massachusetts, the fact that there had been an avoidable transfer of them under an illegal contract to another citizen of Massachusetts, would afford no ground of defense whatever to the Farmington Village Corporation. To the same extent the Village Corporation would have no ground of defense merely because the transfer was entirely colorable, if such it had been, or merely because the plaintiff suing the cou-
41 pons had only possession of them, without any interest in them, inasmuch as they are payable to bearer.

Patten v. Moses et al., 49 Me., p. 255.

But when we come to the question of jurisdiction of the Circuit Court and to the point that the parties were collusively made, we think the same principle applies here, which would be applied even independently of the Statute of A.D. 1875, if it appeared that a colorable transfer of the coupons had been made by a citizen of Maine to a citizen of Massachusetts,

the latter receiving no real interest in them. In such cases it is clear, that even under the
42 Judiciary Act, an action could not be maintained upon them in the Circuit Court against a citizen of Maine.

Now then, with reference to the question of jurisdiction and with reference to parties being collusively and improperly made, what is the distinction between a case where the original holder of the coupons is entitled by agreement to recall his coupons at his will, and a case, where by reason of the whole scheme for giving the Court jurisdiction being in violation of the law, he may recall them also at his will?

To put it in another form and upon a somewhat
43 different principle, we may say further, that the champertous nature of the arrangement affords of itself a legal presumption of infringement of the fifth section of the Act of A.D. 1875.

E. The consideration of the second and sixth assignments of errors involves to some extent the same point, namely, that the coupons were dishonored when negotiated.

Plaintiff below never acquired the bonds, but only the coupons, and these after they had been dishonored and after a large portion were barred by the statute of limitations; which defense though was not
44 pleaded.

Amy v. Dubuque, 98 U. S., pp. 470 and 473.

Burnham v. Brown, 23 Me., p. 400.

We claim that disconnected coupons, which may be the basis of an independent cause of action, as these are claimed to be in this suit, if acquired after maturity, are in that respect under the same rules as other commercial paper, and subject to all original equities.

Daniel, on Negotiable Instruments, 3d edition, section 1505.

Evertson v. The National Bank of Newport, 66 New York Appeals, pp. 14 and 23.

45 A distinction exists where the transfer is of a bond or note not matured, with overdue interest or coupons.

Bank v. Kirby, 108 Mass., p. 497.

Cromwell v. County of Sac., 96 U. S., pp. 51 and 58.

Railway Co. v. Sprague, 103 U. S., p. 756.

In the latter case the reason is given, p. 761, as follows:

"To hold that the moment an unpaid coupon is left on a bond, its character and negotiability are changed, would greatly embarrass the traffic in such se-
46 curities and lead to needless uncertainty and confusion;" and in Bank v. Kirby, *ante*, the reason given for applying the same principle to notes with overdue interest is, p. 502, "that it is important that the value due to their negotiable character should not be impaired by new rules, tending to lessen their currency and credit."

It could not be possible, that either this Court or the Massachusetts Court intended to extend this protection, except to dealers in current securities, or intended to cover by it a transaction entirely uncommercial like this at bar.

47 We think there is nothing in the cases cited to overcome the authority of Daniel on Negotiable Instruments, and Evertson v. The National Bank of Newport, *ante*.

If this Court agrees with the Court of Maine, that the act authorizing these bonds was unconstitutional, then, even if the plaintiff was a *bona fide* holder without notice, he could not recover.

Northern Bank v. Porter Township, 110 U. S., pp. 608 and 618.

But our assignments of error, Nos. 2 and 6, do not raise exactly this question in the same form; that will be raised later in the case.

48 ~~With reference to assignment of error No. 6, if we show that the suit in Maine was effectual as *lis pendens*, then, as to the coupons covered by that assignment, we do come within the principle of Northern Bank v. Porter Township, *ante*.~~

F. G. Butler, Samuel Belcher, and Hannibal Belcher owned fourteen hundred (1400) dollars of the bonds, folio 30. These individuals were defendants in the suit in Maine, in which the statute was declared unconstitutional and void, folios 35 and 36. The bill describes

them as "committee"; but this "committee" was not known to the statutes and did not absorb their
49 personality.

Therefore we say the decree estopped them and any person holding under them, unless a *bona fide* purchaser without notice before maturity.

Scotland County v. Hill, 112 U. S., p. 183.
Lewis v. Brown Township, 109 U. S., p. 162.

As already shown, folio 8, *ante*, of all the bonds issued ten thousand one hundred (10,100) dollars were as collateral; and the right to redeem is not shown to have been extinguished.

The transfer to Pillsbury of these collateral
50 coupons, was not in accordance with any provision of law for realizing the value of pledged property; yet we suppose Pillsbury has all the rights of the original holders and no more.

In relation to pledged property, the ordinary rule is, that the value of the pledge must be realized either by a sale after notice or by a bill in equity. Yet by an admitted exception, the pledgee of negotiable notes signed by third parties transferred to him as collateral by his debtor, collects the same; though the common practice is, and we believe the authorities sustain it, that where obligations of third parties so
51 pledged, come in the form of long bonds with coupons, the pledgee may realize under the ordinary rule relative to pledges.

Jones on Pledges, Sec. 721.

With reference, however, to cases like this at bar, where the debtor gives as security for his promise an instrument having the form of another promise from the pledgor himself, we have not been able to find any cases directly authorizing the pledgee to maintain a suit against the pledgor upon the collateral obligation; and see no reason for extending to them the exception stated above relating to pledged promissory notes of third parties.

At first sight, Rosevelt v. Mark, 6 Johnson Chancery, p. 266, may seem to hold this; but an examination of the case shows, that the collateral bond
52 there given became the original agreement, and supplanted the implied agreement to indemnify against loss by endorsements.

Also there are cases where the holder of collateral obligations has been allowed to realize property of the pledgor, mortgaged to secure the collateral obligations; but the principle there is, that though the property is mortgaged nominally to secure the collateral obligations, it equitably secures the original promise.

From the very nature of the thing, it is difficult to conceive for what purpose the collateral obligation of the principal debtor is put in the hands of the
53 pledgee, except that he may realize by a sale, made by himself after notice or by order of the Court in chancery.

In the case at bar the bonds delivered as collateral, by the essential principles of the doctrine of pledge, remain the property of the pledgor delivered into the possession of the pledgee for a special purpose. Being then the property of the pledgor, they could not constitute a promise from himself to the pledgee; but only the forms of promises, which become effective when the pledgee in a lawful way transfers them to some third person.

54 In the case of delivery to the pledgee of notes or obligations of some person other than his debtor, there is a necessarily implied authority that the pledgee may collect interest or installments as they come due,—in fact there may be a duty upon him to collect them; but with reference to obligations of the original debtor transferred to him as collateral, there is no necessary implication of an assent that they should be collected, and in fact, in a multitude of cases, such an implication would compel the pledgor to pay indirectly the whole or part of the principal debt, before it came due by its own terms.

55 But on this point our main reliance is, that from the essential nature of the transaction as already explained, the collateral obligations cannot constitute a promise from the pledgor to the pledgee; and only constitute the pledgee the bailee, with authority to sell the collateral obligations as pledges are sold after default, so that in the hands of the purchasers they may become effective obligations.

Now if the original holders of these bonds and coupons, for instance, the bank described in folio 31 under date of February 6th, 1871, holding bonds to the amount of nine thousand (9,000) dollars as
56 collateral, and the clerk of the county commissioners, folio 31, under dates of July 3d, A.D. 1871 and November 8th, A.D. 1871, holding bonds as collateral for land damages, could not have brought suit against the corporation upon those bonds or coupons, neither could the parties to whom those bonds were distributed according to folio 32 and who knew the whole transaction; nor could Pillsbury, the original plaintiff, whose equities, as we have seen, are no greater than those of the parties to whom the bonds and coupons were originally delivered.

F. Coming to the first assignment of error,
57 namely, that the rule of Dyer et als. against this plaintiff in error, 70 Me. Reports, p. 515, is law.

The casual reading of the 37th folio of the record to the effect that only four judges concurred in the opinion, would give a wrong impression.

The then existing law of Maine, Revised Statutes of A.D. 1871, chapter 77, section 9, required only five of the eight Justices composing the Supreme Judicial Court, to sit *in banc;* and required the concurrence of five justices, "except, when any of them were disabled to act by reason of interest or other disqualifica-
58 tion, a majority of the others should be sufficient." That is to say, the statute requires at

the outset five, ~~which is~~ a majority of the whole eight judges, to concur; but if disqualified, thus reducing the number who can sit to six or seven, the concurrence of four would be sufficient.

The statute requires three terms *in banc* in each year; and the uniform practice for years has been for six justices to sit *in banc*, being one more than the *minimum* fixed by statute. That number sat at the term where this case was argued *in banc*,—these judges,
59 as it appears by 70 Me. Reports, pp. 522 and 529, being Chief Justice Appleton, Justices Walton, who gave the opinion and who is one of the most accomplished and experienced judges of New England, Virgin, Peters, now Chief Justice, Libby and Dickerson. Libby was disqualified as having been of counsel, and Dickerson had the opinion in his possession for examination at the time of his death; which probably accounted for a considerable portion of the delay, though under the peculiar practice of Maine great delays sometimes occur in the decisions of causes argued *in banc* involving no difficult question.

A casual reading of folio 37 might give an im-
60 pression that three of the seven living judges dissented; while the fact is, that the opinion received the concurrence of every judge sitting at the term when the case was argued, except one who had died and one who was disqualified. There is no evidence that any judge who did not sit, was called into the case; and the opinion was therefore unanimous according to the practice in Maine.

While it may be that this Court has gone so far as to hold, that residents of a State may escape the
61 decisions of their own State courts, by transferring to non-residents bonds or coupons long ceased to be "commercial" in the proper sense of the word, and while, perhaps, this Court has also gone to the extent of holding, that in the absence of express constitutional provisions, questions of the powers of municipalities are matters of general jurisprudence; still we think this Court must concede, that the opinions of State judges of great experience as to questions arising under the constitutions of their own States, are entitled to very great weight and are not to be disregarded, unless strong and clear reasons are given to the contrary.

While we may be compelled to admit it to be settled by this Court, that a decision of a State court upon a local question affecting the validity of a con-
62 tract, is not binding on this Court, if the decision was rendered after the contract was made; yet as bearing upon the weight and authority of the decision in Dyer et als. v. this plaintiff in error, we take exceptions to the general language of the Court in Olcott v. the Supervisors, 16 Wallace, p. 678, and claim that questions of this character, even in the absence of express prohibitions in the State Constitution, may, by reason of implications arising out of sundry expressions contained in it, or arising out of the settled habits of the people of the State, be purely local questions, upon which the decisions of the State
63 courts have peculiar authority.

We think it clear, that this case is not a case of local improvement, like sewers, street betterments, drainage of swamp lands and such matters, but a case of taxation for a public purpose; and therefore the conclusions of the Maine court, on which we rely, appear, first, on p. 525, as follows:

"The result of all the cases is that a local tax, by which term is meant a tax assessed upon a community or a territory, which is less than that on which the general assessment for other public purposes were made, could not be made for a public purpose."

64 And second, on p. 526, as follows:

"As well might a school district, after being taxed in common with all the rest of the town for highway purposes, have a special tax laid upon it, to lay out some new highway or build an expensive bridge; or after being taxed in common with all the rest of the town for the support of paupers, have the additional burden of supporting some particular pauper laid upon it."

That railroads, though constructed by private corporations, and owned by them, are public highways, has been the doctrine of nearly all the courts ever
65 since such convenience for passage and transport have had an existence.

Olcott v. the Supervisors, *ante*, p. 694.

It is upon that ground always, that the right of taxation for aiding in the construction of railroads has been sustained.

In accordance with the immemorial usage of New England and ever since Maine has been a State, the *quasi* corporations which have borne the burden of public expenditures, have been towns and plantations; and by the Statutes of Maine the word "towns" includes cities, which are in Maine the same as towns, barring only the method of exercising their several powers.

66

The only exceptions have been school districts which bear the expense of maintaining their district schools, and local parishes, which provide for their own religious teaching.

Village corporations organized like the plaintiff in error for special local purposes of providing fire department and police, are of modern invention.

Towns, plantations and cities are recognized by the constitution of Maine as municipalities, by article 2, section 1, requiring electors to have their residences in the towns or plantations where they vote, article 4, part 1, section 3, apportioning representatives among towns, and section 5, providing for the method of elections in cities. Village corporations are nowhere recognized by the constitution.

67

Until the act authorizing the plaintiff in error to aid the extension of the railroad of the Androscoggin Railroad Company, all public assistance whatever to railroads in the State of Maine, aside from a grant of lands by the State in a single instance, has been by cities

and towns; and by the statute of A.D. 1867, chapter 119, a general law was passed, regulating this
68 matter and giving the cities and towns general authority to aid in the construction of railroads.

With the exception of some aid granted by the State in remote sections, the whole burden of constructing and maintaining ways, whether laid out by authority of cities, towns or plantations, or laid out by the officers of the county, have been borne in Maine by the cities, towns and plantations, both by immemorial usage and by statute; and village corporations, especially the plaintiff in error, have no more connection with ways by the nature of their organization or by usage, than have religious local parishes, or school districts,
69 or wards established by cities for voting purposes.

Therefore in the case at bar, as stated by the Supreme Judicial Court of Maine, the plaintiff in error is bound to contribute, in common with the whole town of Farmington, to the construction and maintenance of ways; and, if under the public statutes of Maine by which the town of Farmington has authority, to the extent of five per cent of its whole valuation, to aid the construction of other railroads, possibly parallel with the railroad in the case at bar, the town of Farmington should so determine to aid, the polls and estates
70 within the limits of the plaintiff in error would be compelled to contribute.

The result is, that the question is not, as put by the defendant in error, one of unavoidable inequality in taxation, which is the question commonly considered by the courts, and which, it is admitted, must be submitted to to a certain extent; but is a question of double taxation precisely as put by the Supreme Judicial Court of the State.

In other words, if this act is constitutional, the polls and estates within the limits of the plaintiff corporation may be taxed for public ways, as other polls and
71 estates in the whole town are taxed, and also bear this additional burden sought to be imposed in the case at bar.

Therefore the illustration which the Supreme Judicial Court of Maine makes by reference to school districts is an apt one. The tax sought to be laid in the case at bar is as plainly contrary to the requirements of the Constitution of Maine, with reference to uniform taxation and against double taxation, as it would be, if a part of the parishioners in a local parish organized for religious purposes, or if the voters in a city ward organized for voting purposes, attempted under cover
72 of legislation to double the taxation of those localities in the same way.

Therefore we say, the Supreme Judicial Court of the State of Maine is right, when it says, p. 526, "the constitution will not allow of such special taxation, namely, the taxation of selected and limited portions of erritory, for a public purpose."

The case of Bank of Rome v. the Village of Rome, 18 N. Y., p. 38, relied on by the defendant in error, we think is not pertinent, because:

1st. In that case the question here stated was
73 not considered; and

2d. It appears, p. 41, that by the constitution of that State, cities and incorporated villages are run into the same class.

G. The defense set up against these bonds and coupons is not inequitable, because the case shows that the minority of the Village Corporation from the very outset, and beginning before the bonds were issued or any contracts made under the statute, used all the legal means in their power to prevent the issue of the bonds, or the making of the contracts, and parties proceeding under the statute therefore proceeded at their hazard.

It is claimed that only a small minority of the village were opposed. Thirteen of them joined in the first legal proceeding, and seventeen in the
74 second. Of two hundred and eleven (211) polls in the village, one hundred and forty-six (146) voted for the loan. Therefore, it is plain, as claimed, that only a minority and perhaps a small minority were opposed; but as this minority were not silent and have done everything in their power to resist the proceeding, their rights are as much entitled to be protected as if they were the majority, and, if the majority of the corporation desire to pay these bonds, let it find

some way to do it without involving the protesting minority.

H. We have not scanned carefully the pleadings in defence to see whether they raise all the specific questions raised in this brief. The practice in Maine
75 does not require it, as there a plea of the general issue in a suit of this character covers all defences except that of the statute of limitations.

The printed record shows some errors which we believe have been corrected by filing a supplemental transcript. They are,

1st. Folio 25 says "This act was approved February 21, 1879." It should be "1870."

2d. Folio 31, under date of August 20, 1870, "38,000" should read "3800"

3d. Folio 31, under date of May 10, 1871, speaks of the arrangement of February 6, "1870," which
76 should be February 6, "1871."

4th. No. 4, folio 41, gives the date of the judgment 9th day of June, "1880," which should be "1881."

WILLIAM L. PUTNAM,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 199.

THE FARMINGTON VILLAGE CORPORATION,
PLAINTIFFS IN ERROR,

vs.

EBEN F. PILLSBURY.

SUPPLEMENTAL BRIEF FOR THE DEFENDANT IN ERROR.

BY CHARLES F. LIBBY,
Of Counsel.

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BY CHARLES F. LIBBY.

Since this case was argued in the court below there has been a change in the counsel for the plaintiff in error, Mr. Putnam taking the place of Messrs. Webb and Haskell, both of whom now hold judicial positions. As a result of this change the defense has assumed a new phase, and questions are raised here which were not presented in the court below. The brief for the defendant in error was prepared with reference to the questions discussed in the Circuit Court, and in ignorance of the positions taken by plaintiff's counsel in his brief filed in this court. An examination of that brief has disclosed new questions raised here, some of which are based upon claims which were virtually abandoned in the court below, and has rendered necessary the preparation of a supplemental brief for the defendant in error.

At the hearing in the Circuit Court the principal contentions on the part of the defense were these:

(1) That the coupons in suit were not in form negotiable, and therefore, if transferred separate from the bonds, an assignee could not bring an action upon them in his own name, although the bonds themselves were in form negotiable.

(2) That the decision of the Supreme Court of Maine in the suit brought to enjoin the issuing of the bonds, to which the coupons in suit were attached, was conclusive upon the Federal Court.

(3) That the act of the Legislature of Maine authorizing the issue of said bonds was unconstitutional and void.

A perusal of the record, including the special finding of facts and the statement of the questions on which the judges disagreed, indicates clearly that these were the principal questions presented to the court, and were the only ones on which the judges disagreed, the other questions raised by the pleadings being abandoned by the defence or negatived by the special findings of facts.

We understand that counsel for the plaintiff has now substantially abandoned two of the positions taken by the defence below, and admits:

(1) That the coupons in suit are negotiable in form, and

(2) That the decision of the Supreme Court of Maine holding the act of the Legislature to be unconstitutional is not conclusive upon this court. (See p. 27 of his brief.)

He however contends:

(1) That the rule laid down by the Supreme Judicial Court of the State of Maine in the case of Dyer et. als. v. the Farmington Village Corporation, 70 Me. Reports, p. 515, is law.

(2) That no suit can be maintained against the Village Corporation, for the coupons attached to or severed from the bonds which have been issued by it as collateral, as already explained.

(3) That the suit was brought in contravention of the 5th section of the Act of March 3, A. D. 1875.

(4) That by the legal effect of the agreement of May 5th, A. D. 1880, if it is valid, Pillsbury holds an interest in common in the coupons with the original holders, who are all citizens of Maine; that they have therefore an undivided interest in the controversy with him, and have not so completely transferred their interest as to give the Circuit Court jurisdiction.

(5) That by the laws both of Maine as well as of Massachusetts, the arrangement as to Pillsbury, per folios 39 and 40, was illegal and void, so that he holds all the coupons subject to recall by citizens of Maine.

(6) That as to the $1400 of bonds and coupons attached thereto, owned by F. S. Butler, Hannibal Belcher and Samuel Belcher, the suit in Maine was effectual as *lis pendens*.

The first assignment of error is considered in our first brief, pp. 14-27.

The second, fourth, fifth and sixth assignments of errors raise new questions which were not presented or discussed in the court below.

The third assignment of error was, although raised by the pleadings, not sustained by the evidence or the finding of the court.

A The third, fourth and fifth assignments of errors may be considered together, as they relate to the questions of the jurisdiction of the Circuit Court.

These assignments are based upon certain inferences which the counsel for plaintiff in error seeks to draw from the special finding of facts, but which are not included in the finding.

He asks this court to supplement the finding of the court below, and in aid of his defence to treat the special finding as a report of evidence which by a process of weighing and balancing may yield other facts than those found by the Circuit Court.

This function, we understand, this court has repeatedly refused to perform, and to have held that a special finding must contain "a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest."

Burr v. Des Moines Co., 1 Wall. 102.
See also, Suydam v. Williamson, 20 How. 432.
U. S. v. Adams, 6 Wall. 111.
Mumford v. Wardwell, 6 Wall. 432.
Barnes v. Williams, 11 Wheat. 416.

"Whether the foundation of the judgment be a statement of facts, a special verdict, or a special finding, the statement must be sufficient in itself, *without inferences* or comparisons or balancing of testimony or weighing evidence, to justify the application of legal principles which must determine the case."

Smith v. Sac. Co., 11 Wall. 162.

It will hardly be contended that the Circuit Court found a collusive transfer of these coupons, for the judges found the fact of transfer and the consideration of the same and did not find collusion, and on these points there was no disagreement between the judges. The fact that this point was raised in the pleadings (Folio 19) and not sustained by the court seems to us conclusive, as the court was obliged to pass upon it in order to sustain the plaintiff's right of action.

Plaintiff in error simply says: "The transaction on the face of the papers was such that the Circuit Court should have dismissed the suit," (Brief Folio 30,) and this in the absence of any evidence or any finding of fact which impeached the absolute character of the transfer or the good faith of the transaction. The finding is in favor of the plaintiff and gives the details of the transaction. Unless this court is to hold that such a transaction cannot be genuine, the absolute sale of the coupons to the defendant in error is established, and there is nothing in the case to contradict this fact.

For furthur discussion of this point, we refer to our earlier brief, pp. 8 and 9.

B Plaintiff in error further says: "That the transfer was only a partial one, so that, although the coupons were payable to bearer, the original cause of action did not entirely go out of the original holders of the coupons, who were citizens of Maine." (Brief Folio 31.)

We respectfully submit that such a construction of the special finding of facts is wholly unauthorized.

The finding is of an unrestricted sale and transfer of the coupons. The title to the coupons passed to the defendant in error, and is in no wise affected by the agreement to pay "fifty per cent. of the net amount collected above said five hundred dollars" in case the full amount of the coupons was collected. There is nothing in the record or the facts of the case to sustain the statement in plaintiff's brief (Folio 32) that defendant in error "became agent for the original holders of one-half of the amount of the coupons in excess of the sum of five hundred dollars."

There are none of the features of agency in the transaction and no agreement on which it can be based. The agreement to pay fifty per cent. of the net amount received was a proper one, and in no wise vitiated the transaction. It did not affect the absolute character of the sale, but was simply an agreement to pay an additional sum contingent upon the future value of the property. There was no ground on which the parties could rescind the sale. The note was payable absolutely whether the coupons were collected or not, and there was no agreement even that a suit should be brought.

Plaintiff's counsel further says, (Folio 35): "This was not a case where the entire interest was transferred, receiving back a mere agreement to pay money, because there was no formal transfer of the coupons. They were simply deposited in the possession of Mr. Pillsbury, so that the transfer did not necessarily imply a transfer of title."

In reply we say that it does not appear by the finding of facts whether there was a written transfer of the coupons or not—but that such fact is immaterial as such a sale need not be in

writing and the title would accompany the transfer of possession.

So far as the finding of facts stands, the transfer of the title was absolute in the defendant in error, and the arguments of plaintiff are based on assumptions not warranted by the finding. If these questions had been raised in the lower court they would doubtless have been met by special findings. The absence of such findings cannot, we submit, aid the plaintiff in error. According to the ordinary course of events, and for aught that is known to counsel, Pillsbury has long since paid his $500 note. So that if this court shall adopt the view of the plaintiff in error, and hold that the sale was not absolute, he will have paid his money in good faith and yet be deprived of his rights in the transaction. Certainly this court should not be asked to make violent presumptions in aid of such a result.

If under the finding Pillsbury is the real owner of these coupons, the Statute of 1875 has no application to the case, according to the decision of this court in Bernard Township v. Stebbins, 109 U. S. 355.

C Plaintiff further claims: "That the whole transaction with Pillsbury was in contravention of the criminal laws both of Maine and Massachusetts, and a case of champerty," (Folio 37,) and cites a statute of Maine which prohibits the bringing, prosecuting or defending "any suit at law or in equity on shares." No statute from Massachusetts is cited. We are unable to see in what particulars this transaction violates such a statute, or the applicability of such a statute to this case. This statute has reference to attorneys and does not prohibit the *purchase* of a claim on any terms satisfactory to the parties. Pillsbury became the owner of the coupons, and there was no agreement to bring a suit "on shares." To contend otherwise, we submit, is to ignore the finding of facts. Neither does the agreement fall within the definition of champerty, which is "the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of it." Halloway v. Lane, 7 Porter 488.

"Champerty does not apply to a *bona fide* purchaser of any right in possession or action."

Verdier v. Simonds, 2 McCords, Ch. 885.

The statute of Maine has no application to this case, as this sale and agreement was made in Massachusetts, and a state statute would not control the rights of parties in a Federal Court.

This court has decided that the thirty-fourth section of the Judiciary Act, "upon its true construction and intendment, is strictly limited to local statutes and local usages, and that it does not extend to contracts and other instruments of a commercial nature."

Swift v. Tyson, 16 Peters, 1, 18.
Railroad Company v. National Bank, 102 U. S. 30, 54.

The Federal Courts do not recognize the old common law rule as to champerty.

See Trist v. Child, 21 Wall. 450.
McPherson v. Cox, 6 Otto 404.
Wright v. Tibbetts, 1 Otto 252.
Wylie v. Coxe, 15 How. 415.

We submit that none of the objections urged by plaintiff's counsel bring this case within the operation of the Act of March 3, 1875.

D The sixth assignment of errors seems to us unsupported by the special finding of facts in this case.

It assumes that F. S. Butler, Hannibal Belcher and Samuel Belcher, were the owners of $1400 of the bonds, and that these bonds were subject to the doctrine of *lis pendens* on the ground that "these individuals were defendants in the suit in Maine, in which the statute was declared unconstitutional and void. The burden is upon the plaintiff in error to sustain this defence. The finding of facts must support it or it fails.

To this assignment we answer, that it nowhere appears in the record:

(1) That the above individuals were the owners of that or any other amount of bonds.

(2) That if they were owners of such bonds, they must have become such Aug. 20, 1870; and that the suit "in which the statute was declared unconstitutional and void," was not commenced until August 12, 1872.

(3) That, even if such were the case, it does not appear that any of the coupons in suit were taken from such bonds.

(4) That as to the whole issue of $20,000 of bonds, it does not appear that any holder is affected by notice of that suit, and that Pillsbury, the defendant in error, has all the rights of the original holders, as *bona fide* holders for value without notice, although he took them after maturity.

We will consider the questions presented by our answers in the above order.

(1) Plaintiff's assignment is based upon the fact appearing in the record (Folio 30) that before the bonds were issued, in June, 1870, "nineteen persons subscribed for bonds amounting in the aggregate to thirty-nine hundred dollars," of which said Butler and Belchers subscribed for fourteen hundred dollars. On Folios 31 and 32, it appears how the bonds were disposed of, with dates and amount. Under date of August 20th, 1870, is the following:

"Sold and delivered to sundry persons, *principally* the subscribers to the paper of June, 1870, bonds to the amount of $3800 (incorrectly printed $38000). This is the only finding on which the claim of plaintiff's counsel can be based, and it will be seen that although the subscription was for $3900, that some of the subscribers did not take the bonds, as the sale amounted to only $3800, and included other persons than the subscribers,—the record says, 'sundry persons, principally the subscribers.'" We submit that this finding does not support the plaintiff's statement (Folio 48) that "F. S. Butler, Samuel

Belcher and Hannibal Belcher owned fourteen hundred dollars of the bonds."

(2) From the above extracts from the record we have shown that if said Butler and Belchers became owners of any bonds, such bonds are included in the sale of August 20th, 1870, and that their title as *bona fide* holders was perfected at that time. The suit which was then pending, commenced June 20th, 1870, was dismissed August 3rd, 1872, as appears by the record (Folio 34), for the reason that the Supreme Court of Maine, having then limited equity powers, had not jurisdiction of the bill (Folio 35). Such a bill could not affect anyone's rights, as it resulted in no decree except that of dismissal. Subsequently, August 12, 1872, a new bill was filed by different complainants—(the first bill being filed by twelve persons and the second by fourteen persons, as plaintiffs. See record, folios 33 and 35)—and in this second bill an injunction was finally granted. Plaintiff in error, in his brief, (Folio 5,) speaks of these two suits as "prosecuted continuously." It is difficult to see how bills separated by a considerable interval of time, and having different parties complainant, one bill having been dismissed nine days before the other was commenced, constitute continuous process. There is certainly no legal continuity which would affect the rights of holders of these bonds. Although Butler and the Belchers were made parties defendant to this bill, their rights as *bona fide* holders for value had attached before it was commenced, as above explained, and could not be affected by its pendency. The defendant in error succeeded to these rights, even if coupons from these bonds are included in the suit, which the record does not show, a point we will now consider:

(3) If the statements of plaintiff in error were correct as to the ownership of the bonds, it does not follow that any of the coupons in suit were taken from such bonds. The whole amount of bonds issued was twenty thousand dollars, as appears by the record (Folio 29), as follows:

50	15 years bonds,	$100 each,	$5000
10	20 " "	500 "	5000
10	25 " "	500 "	5000
50	30 " "	100 "	5000

Each series of bonds is numbered independently.

From an examination of the account annexed to the writ, (Folios 8 to 18,) where the numbers of the coupons and bonds are given, it will be seen that the bonds represented by the coupons in suit amount only to $17,900, so that there are $2100 of the bonds issued which are not represented by any coupons in this suit. The numbers and denominations of the bonds sold to different persons do not appear from the record. If the plaintiff in error sets up a defence based on the fact that any particular bonds are affected by notice, he is bound to show that such bonds are included in this suit. This he cannot do from the record. The $1400 of bonds referred to in the sixth assignment may well be those not represented in this suit.

(4) The disposition of the bonds and the dates at which they were negotiated are shown in the record (Folios 31 and 32). From this it appears that all the bonds were sold or pledged before August 12, 1872, except $2000, which were sold November 12, 1872, "to sundry persons, $1000 of the same for cash and $1000 of the same for the notes of the purchaser." These two thousand dollars of bonds are the only ones that could be affected by the pendency of the suit which resulted it the injunction, and which was commenced August 12, 1872. Who the purchasers of these bonds were does not appear, but it does appear that they were purchasers for value, and if the plaintiff in error set up as a defence that they had notice of the suit, the burden is upon him to prove it. As there is nothing in the record to sustain it, we think it must fail, as it is not claimed that the holders of the pledged bonds were not holders for value.

If the original holders of all these bonds had, as we contend, all the rights of *bona fide* holders for value, then defendant in error has the same rights, although he acquired the coupons after maturity.

Cromwell v. County of Sac., 96 U. S. 51.
Chalmers v. Lanion, 1 Campbell 382.
Daniel on Neg. Inst., Sec. 803.
Roberts v. Lane, 64 Me. 111.

E The second assignment of errors is based on the theory that no suit can be maintained against the Village Corporation on the coupons attached to the pledged bonds, for the reason as stated, (Folio 55,) "that from the essential nature of the transaction the collateral obligations cannot constitute a promise from the pledgor to the pledgee."

Plaintiff's counsel speaks of these bonds as if pledged to secure another promise of the Village Corporation. For he says, (Folio 51,) "with reference, however, to cases like these at bar, when the debtor gives as security for his promise an instrument having the form of another promise from the pledgor himself, we have not been able to find any cases directly authorizing the pledgee to maintain a suit against the pledgor upon the collateral obligation." Such, we do not understand, is the nature of the transaction, as will appear, we think, from an examination of the record.

The Village Corporation, through its committee, had, on the 15th day of April, 1870, entered into a contract with the Railroad Company for the extension of the railroad across the river into the limits of the village, and therein agreed to pay the railroad, towards the expense of such extension, the sum of fifteen thousand dollars, in four payments as the work progressed, and also agreed to pay the land damages for the location of the road and the necessary depot grounds, and the bonds in question were issued to raise funds to carry into effect this contract, which was authorized both by an act of the Legislature and a vote of the Village Corporation. These facts appear in the record (Folios 25 to 28). The Railroad Company immediately set to work and completed its extension, with station buildings, on or before February 15th, 1871, when the last quarterly payment of $3750 was made to it by the Village Corporation—"the other payments being made July 18, Aug. 24 and Nov. 24, 1870,"—(Folio 30). As money was needed to meet the contract faster than purchasers were found to take the bonds, recourse was had to loans from citizens, based upon their notes, which were discounted at the Sandy River Bank, and the proceeds used by the Village Corporation to meet their contract with the Railroad Company. The amount of the bonds pledg-

ed to secure the signers of these notes was a little larger than the amount of the notes. The bonds amounting to $9000, the notes to $8190, (Folio 31). February 6, 1870, (incorrectly printed in the record as February 6, 1871,) these bonds were deposited "with T. F. Belcher, Cashier of the Sandy River Bank, in trust as collateral security to *indemnify* the signers" of these notes, three in number.

We submit that the transaction amounts simply to this, that in exchange for their notes the Village Corporation gave the signers these bonds, with the right in the Village Corporation to pay a less sum than their face—viz.: the amounts of the notes—to obtain a redelivery of the bonds, the makers of the notes desiring payment before the maturity of the bonds, and in season for the maturity of their notes. The bonds were not given as collateral to any other promise of the Village Corporation, as no other promise is shown, nor does it appear that the Village Corporation became parties to the notes which were discounted, but it is the case of a person giving a note larger than the loan, with the right but not the obligation to anticipate payment with a smaller sum. If not paid the holder can enforce the written promise, and we contend that these bonds were given to the signers of these notes with the intent that they should derive all the benefits from them which their form afforded. "These notes were not paid at maturity, but remained in the bank until sometime in 1875 or 1876, when the bank insisting upon payment, the signers took up their notes and divided among themselves in the proportions that they had contributed to the notes, the whole of the $9000 collaterals," (Folio 32). Whatever may be considered the precise nature of the transaction, the signers of the notes stood in the position of *bona fide* holders for value of the bonds, at least to the extent of the amount paid on the discounted notes, and these rights, being in the form of negotiable instruments, they were able to transfer to others, and enable them to collect the amount due on the coupons, provided it did not exceed the total amount which they were entitled to collect of the Village Corporation.

As regards the $1100 of bonds deposited with the clerk of the County Commissioners in 1871, to secure the land damages

claimed by C. Drake and Moses and Eliza Perham, (Folio 31,) they were so deposited in accordance with the Statute of Maine, (R. S. 1871, ch. 51, sec. 6,) which provides that "when requested by the owner, the Commissioners are to require the Railroad Corporation to give security for the payment of damages and cost, by depositing, at its risk, with the clerk, specie, notes or obligations of a State or Public Corporation, or other security satisfactory to the party requiring it." Here the Village Corporation had agreed with the Railroad Company "to pay the land damages for the location of said railroad extension and for the necessary depot grounds, (Folio 28,) and accordingly deposited their own bonds to secure the payment. After the award of damages was made, but at what date does not appear, probably in 1871, F. S. Butler "advanced the sum of $997.80, cash, to pay the Commissioners' award of damages," and took the bonds as security for the money he so advanced—(Folio 32). To the extent of his claim he was therefore a *bona fide* holder for value.

Plaintiff's counsel says, (Brief Folio 49,) "of all the bonds issued, ten thousand one hundred (10,100) dollars were as collateral; and the right to redeem is not shown to have been extinguished."

It is not shown that the right to redeem was extinguished for the reason that no question was raised in the court below as to any bonds being then held as collateral. No right of redemption was claimed to exist there, and it was not necessary for the court to find how the right was extinguished, or when the bonds were transferred by the first purchasers to other persons. For aught that appears in the case the right of redemption was extinguished long before the transfer of the coupons was made to the defendant in error. If any question had been made in the court below on this point, it would undoubtedly have been covered by the finding, and it seems as if it ought to be held too late to raise it here. If, however, it is held to be still open—we say that plaintiff's counsel admits that "Pillsbury has all the rights of the original holders," (See Brief Folio 50,) and we claim that the original holders might have maintained a suit on these coupons, even if they were held as collateral security to another promise of the obligors. We

think this position is sustained by one of the cases cited by plaintiff in his brief.

Rosevelt v. Mark, 6 Johns. ch. 266.

In Androscoggin Railroad v. Auburn Bank, 48 Me. 343, a case where a Railroad Company pledged its own bonds to secure its note, it was held that "a pledgee of credits, to secure a debt due from the pledgor to himself, may properly collect the accruing interest, even before his own demand is due, and hold the amount in pledge. * * * * If one pledges as collateral, a demand in which interest is accruing at stated periods, some of which occur before his debt so secured becomes due, such pledge necessarily implies an authority to the pledgee to collect and receive the interest as it becomes payable, and to hold it on the same terms as the demand itself for the principal. Especially is this the case where the debtor pledges as collateral a bond, with interest coupons attached, which he might cut off before pledging the bond but does not do it."

If these "collateral obligations cannot constitute a promise from the pledgor to the pledgee," as plaintiff in error claims, although he cites no authorities to support his position, then they are a delusion and a snare, and have no meaning.

Even if held to be collateral obligations in this case, a point we do not admit, we contend that they were intended to confer, and did confer, substantial rights such as could be enforced in a suit at law—and that such rights attaching to an original holder could be transferred to others.

Cromwell v. County of Sac., 96 U. S. 59.

F It is unnecessary to discuss further the question discussed at length in our first brief, (pp. 12, 13, 14,) as to whether the decision of the Supreme Court of Maine, in Dyer v. Village Corporation, 70 Me. 515, should control the decision of this court, as plaintiff's counsel admits in his brief (Folio 51) that this court has "gone to the extent of holding, that in the absence of express constitutional provisions, questions of the powers of municipalities are matters of

general jurisprudence," and that "a decision of a State Court upon a local question, affecting the validity of a contract, is not binding in this court, if the decision was rendered after the contract was made."

G The only question remaining, therefore, is the constitutionality of the act of the Legislature of Maine, authorizing the issue of these bonds, or, as put by the plaintiff in his first assignment of errors, whether "the rule laid down by the Supreme Judicial Court of the State of Maine, in Dyer et. als. v. the Farmington Village Corporation, 70 Me. Reports 515, is law."

On this point we have little to add to our previous brief.

Plaintiff labors to show that the opinion of the court was unanimous. In reply, I have only to say, that to the profession the contrary is well known, and that it took the court more than five years to reach a judgment concurred in by four members only of the court.

We have presented in our previous brief the reasons why we believe that judgment is not law, and have little to add to them.

Plaintiff's counsel lays great stress, in his brief, (Folio 68,) on the fact that by its charter the "burden of constructing and maintaining ways" was not imposed on the Village Corporation, and that Village Corporations are not specifically mentioned in the Constitution and "are of modern invention."

In reply, we say, that the extent of power which the Legislature saw fit to confer upon the Village Corporation, was a question addressed to its discretion. It may, if it sees fit to at any time, impose upon them the burden of constructing and maintaining ways. This is a question merely of the convenient administration of local government, and in no way affects the extent of unrestricted legislative power, which we claim exists, under the Constitution of Maine, in the creation of Municipal Corporations. That the Farmington Village Corporation is a "Municipal Corporation" we think is clear under the authorities cited in our earlier brief, (p. 16,) to which we refer.

But few Village Corporations exist in Maine, and this is one of the earliest that was chartered. It is the only thickly settled portion of a town more than six miles square, containing, according to the record, (Folio 23,) "a territory of about 35,000 acres, and about 3300 inhabitants," of which "about 1200 are in the limits of the Village Corporation." Their needs were very different from those of the rest of the town—a sparsely settled farming community—and the Legislature saw fit to constitute them into a separate "body corporate and politic." It gave them such powers as it deemed best for the convenient administration of local government. These may be enlarged, abridged or entirely withdrawn at pleasure." Merriwether v. Garrett, 102 U. S. 472. They are no less a Municipal Corporation than as if they had been created a town. By a special statute (Folio 25) they were authorized to aid in the extension of this railroad across the river, so that its terminus should be within the limits of the Village Corporation. Unless there is some implied restriction upon legislative power in its dealings with Village Corporations, we can see no reason why the court should hold the statute in question unconstitutional. It certainly violates no provision of the Constitution, and we can see no reason in the nature of things why a Village Corporation, as well as a town, should not be authorized to aid a railroad, where the extension was of special and peculiar benefit to itself, as in this case. We have been able to find no case that recognizes the distinction between towns and Village Corporations, which is attempted to be set up in this case, and we see nothing in plaintiff's argument which justifies it.

We append a copy of the Charter of the Village Corporation, referred to in the record (Folio 23).

CHARLES F. LIBBY,

Of Counsel for Defendant in Error.

An Act to Incorporate the Farmington Village Corporation.

Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows:

Sect. 1. The territory in the town of Farmington, comprising front lots numbers twenty-three, twenty-four, twenty-five, twenty-six and twenty-seven, on the east side of Sandy river, together with the inhabitants thereon, is hereby created a body politic and corporate by the name of the Farmington Village Corporation, with all rights and privileges provided by the general laws of the state relating to corporations.

Sect. 2. Said corporation is hereby authorized and vested with power, at any legal meeting called for the purpose, to raise money to defray the expenses of a police, and all other necessary regulations for the better security of property and the promotion of good order and quiet within its limits; for the purchase of one or more engines, and all other apparatus for the extinguishment of fires; for the construction of reservoirs and aqueducts to supply water; for the erection of suitable engine houses and for organizing and maintaining an efficient fire department.

Sect. 3. Any money raised by said corporation for the purposes aforesaid, shall be assessed upon the property and polls within the territory aforesaid, by the assessors of said corporation, in the same manner as is by law provided for the assessment of town taxes. And said assessors may copy the last valuation of said property by the assessors of the town of Farmington, and assess the tax thereon; or, if the corporation shall so direct, may correct said valuation or make a new valuation thereof, according to the principles established by the last state tax, and assess the tax on that valuation.

Sect. 4. Upon a certificate being filed with the assessors of said corporation, by the clerk thereof, of the amount of money

raised at any meeting for the purposes aforesaid, it shall be the duty of said assessors, as soon as may be, to assess said amount upon the polls and estates of the persons residing on the territory aforesaid, and upon the estates of non-resident proprietors thereof, and lists of assessments so made, to certify and deliver to the collector, whose duty it shall be to collect the same in like manner as county and town taxes are by law collected by towns, and to pay over the same to the treasurer of said corporation, who shall receive the same and pay it out to order or direction of the corporation, and keep a regular account of all moneys received and paid out, and exhibit the same to the assessors, whenever requested; and said corporation shall have the same power to direct the mode of collecting said taxes as towns have in the collection of town taxes.

SECT. 5. The officers of said corporation shall consist of a supervisor, clerk, treasurer, collector, assessors, fire wardens, and such other officers as may be provided for in the by-laws of said corporation; and said fire wardens shall have exclusively all the power and authority within the limits of said corporation, that fire wardens now have, or may have, chosen by towns.

SECT. 6. Said corporation, at any legal meeting thereof, may adopt a code of by-laws not repugnant to the laws of this state, for the efficient management of the municipal affairs of said corporation.

SECT. 7. All the officers of said corporation shall be chosen by ballot, and sworn to the faithful performance of their duties; the first election to be at the meeting of the legal voters of the corporation, called to accept this charter, and the annual election of officers shall be in the month of January.

SECT. 8. The clerk shall keep a record of all the doings and proceedings at the meetings of the said corporation.

SECT. 9. The collector and treasurer shall give bonds in double the amount of the taxes so raised, to the inhabitants of said corporation, which bonds shall be approved by the assessors and clerk.

SECT. 10. Epaphras Johnson and Jotham S. Milliken, or

either of them, are authorized to call the first meeting of said corporation, by publishing the time, place and objects of said meeting, one week in the Chronicle, and in the Franklin Patriot, newspapers printed in Farmington, the publications to be seven days at least before the time of holding said meeting, and all subsequent meetings shall be called and notified in like manner by order of the assessors.

SECT. 11. All persons liable to be taxed for polls, residing in the limits of said corporation, shall be legal voters at any meeting of said corporations.

SECT. 12. At the meeting prescribed in section ten of this act, the legal voters shall vote by ballot on the question of accepting this charter, and if a majority shall vote in favor of its acceptance, then it shall take effect, and the corporation shall proceed to organize and choose its officers.

SECT. 13. This act shall take effect when approved by the Governor, but shall not be binding on said corporation unless accepted by them as hereinbefore provided.

[APPROVED FEBRUARY 24, 1860.]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 199.

THE FARMINGTON VILLAGE CORPORATION,
PLAINTIFF IN ERROR,

vs.

EBEN F. PILLSBURY.

ARGUMENT FOR THE DEFENDANT IN ERROR.

BY CHARLES F. LIBBY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 199.

THE FARMINGTON VILLAGE CORPORATION, PLAINTIFF IN ERROR,

vs.

EBEN F. PILLSBURY.

BRIEF FOR THE DEFENDANT IN ERROR.

BY CHARLES F. LIBBY.

The facts of this case are stated in the special finding of the Judges of the Circuit Court, as printed in the record, pp. 13-23.

This finding is in the nature of a special verdict, which is not open to re-examination in this Court, and by the provisions of U. S. Rev. Stat. sec. 1011, "there shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error * * * * * * for any error in fact."

The only questions before this Court are those stated in the certificate of the judges, to be found on p. 23 of the record. The record shows no exception by either party to any ruling of the Court in the progress of the trial, and in such a case "there is nothing open for consideration outside of the questions embraced in the certificate of the judges."

Otoe County vs. Baldwin, 111 U. S. 1.
Kennedy vs. Georgia State Bank, 8 How. 611.
McDonald vs. Smalley, 1 Peters, 620.

The record in this case discloses no rulings of law except on the questions stated in the certificate; to these rulings there are no exceptions, and they can be reviewed here only by reason of the certificate of the division of opinion. The certificate shows three questions on which the judges were divided in opinion:—

FIRST.

"*Whether the plaintiff can maintain an action in this Court upon the coupons declared upon, the bonds or instruments to which they were attached not being assigned to him, but having been issued to and always held by citizens of Maine.*"

The manner in which this question is stated would indicate that the only question on which the judges divided was as to whether a right of action could exist on the coupons independently of the bonds to which they were attached. No question is made as to the assignment of the coupons or the *bona fide* title of the plaintiff to the same, which is impliedly conceded, but the judges seem to have been divided in opinion as to whether an assignment of the bonds as well as of the coupons was necessary to give the plaintiff a right of action.

That an action on coupons may be maintained as distinct and separate instruments from the bonds to which they were attached has often been decided by this Court:

Thompson v. Perrine, 106 U. S 592.
Cornwall v. County of Sac, 96 U. S. 51.
Brine v. Insurance Co., 96 U. S. 631.
Clark v. Iowa City, 20 Wall. 883.
City v. Lamson, 9 Wall. 482.
Aurora City v. West, 7 Wall. 105.
Com'rs of Knox Co. v. Aspinwall, 21 How. 539.

And it has even been held that "the fact that the bonds, from which the coupons sued on have been detached, have been paid and surrendered does not affect the right of recovery upon them. They thereby lose their character as incidents of the bond, but are still independent and self-sustaining instruments."

Nat. Exchange Bank v. Railroad Co., 8 R. I. 375.
Daniel on Neg. Inst., sec. 1510, sections 1488, 1489.

But if the question as stated is held to involve the negotiable character of these particular coupons, we say further that the right of the plaintiff to maintain this action can be sustained on several grounds.

(a) We contend that the coupons are in legal effect payable to bearer, and by commercial usage are transferable by delivery.

Their form is somewhat peculiar in that they do not specify in terms to whom they are payable, but they contain a distinct promise to pay the sum specified in each and are in legal effect payable, like the bonds to which they were attached, "to the holder." (See form of bond and coupon, page 16, of the record.)

The act authorizing the issue of these bonds specially provides for "semi-annual coupons attached thereto," (record p. 14,) and the bonds themselves contain no other provision for the payment of interest except a promise "to pay the semi-annual coupons hereto annexed as they shall become due." These provisions clearly indicate the intention of the Legislature and of the Village Corporation to give to these bonds the character and qualities of coupon bonds, as recognized in the commercial world.

These qualities are well stated in Daniel on Neg. Inst., sections 1488, 1489, as follows: "A coupon bond is an instrument complete in itself, and yet composed of several distinct instruments, each of which is in itself as complete as the whole together."

The coupons "may be severed and negotiated before the maturity of the interest they represent, and then pass as separate and independent securities like other commercial instruments."

"They are attached to the bond to be separated therefrom at the convenience of the holder, and to be thereafter negotiated as money or the representative of money by simple delivery."

See also City v. Lamson, 9 Wall. 482.

If it was not intended that the coupons should be used as independent instruments with the qualities usually attaching to the same, there was no reason for the coupons being issued with

the bonds, but the fact that they were so issued is proof that they were intended to be negotiable. If interest was to be paid only to the holder of the bond, coupons were unnecessary and useless.

Custom and usage have always been recognized as entitled to great weight in determining the negotiable quality of instruments.

Lord Holt in Anon. 1 Salkeld 126, the earliest reported case on the subject, sustained the negotiable quality of a bank bill, "by reason of the course of trade which created a property in the assignee or bearer;" and Lord Mansfield in Miller v. Race, 1 Burrow 452, based his decision on "the course of business and the interests of trade."

In Mercer County v. Hackett, 1 Wall. 95, this court, in sustaining the negotiability of coupon bonds, says, "Usage of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone."

And in Mayor v. Ray, 19 Wall. 478, this court, in speaking of municipal certificates, says, "Custom and usage may have so far assimilated them to regular commercial paper as to make them negotiable, that is, transferable by delivery or indorsement. This quality renders them more convenient for the purposes of the holder."

See also, Murray v. Lardner, 2 Wall. 110.
White v. Ver. and Mass. R. R., 21 How. 577.
City v Lamson, 9 Wall. 484.

The fact that these coupons contain a distinct promise to pay the amount specified in the same is sufficient to distinguish them from interest warrants which in certain cases have been held not to be negotiable because not importing a promise to pay.

See forms of interest warrants in:—

Crosby v. N. L. R. R. Co., 26 Conn. 125.
Evertson v. Nat. Bank of Newport, 66 N. Y. 21.

In the former case, Storrs, Chief Justice, says: "We are by

no means prepared to say, that if the warrants were executed collaterally to the bond, and imported a promise to pay the interest at the times it accrued, they would not themselves sustain an action brought especially upon them, or be evidence under a general indebitatus count in an action of debt."

Even interest warrants have been held negotiable by this court:

See, Woods v. Lawrence County, 1 Black 386.

These coupons may be fairly considered as issued in blank, and thus as negotiable within the principle decided in White v. Ver. & Mass. R. R. Co., 21 How. 577.

It has moreover been directly decided that coupons of the form now in suit are negotiable, the same as if in terms payable to bearer.

In Johnson v. County of Stark, 24 Ill. 90, the coupon was in the following form, viz;

"BOND No. 9.

($60.) Coupon No. 3.

The County of Stark, State of Illinois, will pay sixty dollars on this coupon on the 31st day of July, 1858, at the City of New York.

W. W. WEBSTER, Chairman.

MILES A. FULLER, Clerk."

The Court says:

"It is true that this coupon names no person as payee, nor is it specifically payable to bearer. But the promise is, to pay sixty dollars on this coupon. The promise is to pay the sum named in the instrument, and it can only be demanded by the person holding it, and precisely as if it was payable in terms to the bearer. There is no room to doubt that the specified amount, by the terms of the agreement, is payable to and may be demanded by the holder after its maturity. Its legal effect is, that the money is to be paid on the coupon and to the holder presenting it for that purpose. It then follows that the holder may sue for, and recover the money in his own name."

See also opinion of Grier, J. in

McCoy v. Washington County, 3 Wall. Jr. 371.
Also, Mercer County v. Hubbard, 45 Ill. 142.

The late Judge Curtis, after his retirement from the Bench of the Supreme Court, gave an elaborate opinion in favor of the negotiability of coupons like these, issued by a Maine corporation, which is to be found in "Life and Writings of B. R. Curtis," vol. 1, pp. 284—293.

(b) The right of an assignee to bring an action in his own name on these coupons was specially given by a statute of the State of Maine which was in force when these bonds were issued and when this suit was brought. It provides as follows:—

"When coupons for interest are issued with bonds, and for a valuable consideration are detached and assigned by delivery, the assignee may maintain assumpsit upon them in his own name against the corporation engaging to pay them."

(R. S. of Maine, 1871, Ch. 51, Sec. 29.)

This provision is now found in the chapter on "Railroads," but is a condensation of an earlier statute passed in 1856 (ch. 248), which in its terms was applicable to bonds with coupons for interest thereon "issued by any railroad corporation or any other corporation or quasi corporation within this State."

That the effect of the revision is not to change the law but simply to condense the same,

See, Taylor v. Bowker, 111 U. S. 114.

By section 3, of the act of 1856, relating to the effect of the act on suits then pending, it is apparent that this statute was passed to do away with the question of the negotiability of coupons in the form of those now in suit, which seem to have been very commonly used in the State of Maine from an early date to the present time.

In an early case, (Myers v. Y. & C. R. R, 43 Me. 232,) which has been much criticised, coupons like these are held not negotiable, but the court in Augusta Bank v. Augusta, 49 Me. 507, held that the above act of 1856 gave the right to an assignee to sue in his own name on such coupons.

See also, Jackson v. Y. & C. R. R, 48 Me. 147.

The doctrine of the early cases in Maine, holding that coupons in this form were not negotiable instruments, is declared by Chief Justice Redfield, (2 Redf. on Railroads, 4th Ed. Sec. 239, p. 524, note) to be "contrary to the great majority of cases." It is also criticised in Evertson v. Bank, 66 N. Y. 19, and in Daniel on Neg. Inst., Sec. 1511.

The statute of Maine is applicable to actions in the U. S. Courts, as regulating the "practice, pleadings and forms and modes of proceedings," which by Sec. 914, U. S. Rev. Stat. are to conform to the state practice.

A similar statute of Illinois was held to give a right of action to an assignee in the U. S. Courts:

Robert v. Bolles, 101 U. S. 122.

And in Dennick v. Railroad Co., 103 U. S. 11, this court declared that "wherever by either the common law or the statute law of a state a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

Here the right of action of plaintiff in his own name on these coupons was fixed by the State statute and the Circuit Court had jurisdiction of the parties and in the language of the presiding justice in the Circuit Court, "the plaintiff may well maintain his action to recover the contents of said coupons in this court."

(c) It is well settled that the provisions of the eleventh section of the Judiciary Act, (U. S. Rev. Stat. Sec. 629,) as amended by Act of March 3, 1875, Ch. 137, relating to suits on promissory notes and other choses in action in favor of an assignee, is not applicable to suits on bonds and coupons which are payable to bearer and pass by delivery from one holder to another without formal assignment.

Thompson v. Perrine, 106 U. S. 589.
City of Lexington v. Butler, 14 Wall. 293.
Thompson v. Lee County, 3 Wall. 331.
Bank of Kentucky v. Wister, 2 Pet. 318.

(d) Nor under the finding of facts by the court in this case does section 5 of the act of 1875, relating to collusive joining of parties, have any application to this suit. There is no disagreement of the judges on the fact that the plaintiff was the *bona fide* owner of the coupons in suit. The court finds the fact of the transfer and that the plaintiff gave his note and agreement for these coupons "to the agent of the holders who had taken them to dispose of." (See Record p. 22.) The note was for the payment of $500.—absolutely, and plaintiff was bound in any event to pay that amount. That was all they were worth as coupons discredited by a decision of the State Court. They had no market value. The agreement was to pay an additional sum of fifty per cent. of the net amount collected above said five hundred dollars, "in case he should succeed in collecting the full amount of said coupons."

There is nothing in such an agreement to affect the payment of the $500 note or the absolute character of the transfer.

The agreement recites that plaintiff had "bought" them, and the first question on which the judges disagreed, as stated in the certificate, excludes the idea that the court found anything to impugn the good faith of the transaction.

The defendants set out in their pleading, (Record p. 11,) that plaintiff was not "the *bona fide* holder of the coupons in suit * * * * but that the same were placed in his hands merely for the purpose of bringing a suit thereon in this court." On this issue, upon the evidence, the court must be held to have found against the defendants, as it finds the transfer and the consideration for the same, and does not find that they were *collusively* transferred or "for the purpose of creating a case cognizable" in the United States Courts. There is no suggestion in the finding of collusion or impropriety, or of any purpose in the transaction which that statute was designed to prohibit.

The finding of facts, which in this respect were upon their face sufficient to give the Circuit Court jurisdiction, without finding any prohibited purpose or motive in the transaction, precludes, we contend, any valid assignment of error respecting

it, even if such assignment were not limited to the rulings on matters stated in the certificate. The finding of the court is substantially of an actual sale and delivery of the coupons to the defendant in error for a price paid, without anything to impeach the good faith or the business character of the transaction. Clearly, then, no question can arise here of the duty of the Circuit Court to dismiss the action on grounds which that court alone, in the first instance, had authority to find, and was under obligation to find if they existed, and which are not included among its findings, but are rather negatived by them. We submit that under the facts found by the Circuit Court, the defendant in error was the actual owner of the coupons declared on, and that there is nothing to show an improper or collusive transfer for the purpose of changing the jurisdiction.

In Williams v. Nottawa, 104 U. S. 209, it appeared from the testimony of the plaintiff himself, that he was the owner of only three of the six bonds included in the judgment of the Circuit Court, and that the others were transferred to him solely for the purpose of collection. On this ground the dismissal of the suit was ordered.

In Bernard Townships v. Stebbins, 109 U. S. 355, this court said:

"The decision in *Williams v. Nottawa* establishes that the Circuit Court of the United States cannot, since the act of 1875, entertain a suit upon municipal bonds payable to bearer, the real owners of which have transferred them to the plaintiffs of record *for the sole purpose* of suing thereon in the courts of the United States for the benefit of such owners, who could not have sued there in their own names, either by reason of their being citizens of the same state as the defendant or by reason of the insufficient value of their claims."

The plaintiff of record in this case is the real owner of the coupons, suing in his own right:—and this, we think, is the result of the findings of the court.

These findings are not reviewable on writ of error.

Burr v. Des Moines Nav. Co., 1 Wall. 102.
Ruddock v. Billings, Woolworth 330.

It seems doubtful at least, whether by the act of 1875 the old rule is abrogated, that the subject of the controversy may be transferred for the purpose of gaining jurisdiction in the federal courts, and still the assignment be effective, if the transfer of the interest or title therein is actual and absolute.

McDonald v. Smalley, 1 Peters 620.
Smith v. Kernochen, 7 How. 215—216.
Barney v. Baltimore City, 6 Wall. 288.

In Foote v. Town of Hancock, 15 Blatch. 343, the court says, "It is sufficient to say that the plaintiff is the owner of the coupons, and is therefore entitled to maintain this suit, although his sole purpose in buying them, was to bring an action and collect them in this court."

See also, McCall v. Town of Hancock, 10 Fed. Rep. 8.
Osborne v. the Brooklyn R. R. Co., 5 Blatch. 366.
Manhattan Life Ins. Co. v. Broughton, 109 U. S. 125.

Nor is the *bona fide* character of the plaintiff's title to these coupons affected by the proceedings in the Supreme Court of Maine relating to these bonds.

The bonds were mostly issued and disposed of, as appears on pages 17 and 18 of the record, in the years 1870 and 1871. All but $2000 of them were disposed of before the commencement of the suit which finally resulted in an injunction and it does not appear that any of the coupons in suit were attached to bonds included in the $2000, or that any of the holders of them had notice of such suit.

The first suit was dismissed. The second suit was commenced August 12, 1872,—no preliminary injunction was issued or granted, (p. 21,) and the suit was held under advisement by the court for more than five years, and no decree was entered until August 27, 1878. It further appears (p. 21,) that "the opinion was concurred in by only four of the eight judges composing the court, a fifth who had sat in the cause having died while the opinion was in his hands for examination, and his death made the four judges a majority of the court."

A third suit was commenced October 5th, 1872, against the Village Corporation and its officers only, to restrain the collection of a tax. A temporary injunction was granted "but no evidence of service of same was offered," (p 21). The case was held under advisement until August 27th, 1878, when a decree of perpetual injunction was granted restraining the Village Corporation and its officers from levying a tax to pay the interest on these bonds, but at that time all the bonds had been negotiated for more than five years. No attempt was ever made to recall the issue of these bonds, and there was no order of court restraining their negotiation at any time up to the date of the final decree, August 27, 1878, more than five years after they had all been negotiated.

It is not pretended that there is any fraud in the issue of these bonds, or any irregularities in the action of the town to be cured. Of what could these legal proceedings be notice to anyone? Simply that the power of the Legislature to authorize the issue of these bonds was questioned by certain persons, and that the court had declined to interfere by preliminary injunction and prohibit their negotiation. That is not sufficient to affect the rights of *bona fide* holders; as held in Carroll County v. Swett, 111 U. S. 562.

At the time of the issue of these bonds the constitutionality of legislation authorizing towns and cities to aid in the construction of railroads had been sustained by the highest court of the State of Maine, (see Augusta Bank v. Augusta, 49 Me. 514, decided in 1860,) and no opposing decision had ever been rendered. As late as 1882, in Shurtleff v. Wiscasset, 74 Me. 138, the Supreme Court of Maine decided that "it is not an open question in this state whether the Legislature is violating the constitution in authorizing by special act, certain cities and towns to grant aid in the construction and equipment of railroads, * * * * * such enactments are constitutional."

All persons purchasing these bonds had the right to rely upon the settled doctrine of the Maine Court as to the constitutionality of such legislation, and were not affected by any pending litigation, even if they had knowledge of it, which is not shown.

(e) It is well settled that the doctrine of *lis pendens* does not apply to *bona fide* holders of negotiable securities.

Carroll County v. Smith, 111 U. S. 562.
Thompson v. Perrine, 103 U. S. 820.
Brooklyn v. Ins. Co., 99 U. S. 370.
County of Warren v. Marcy, 97 U. S. 96.
Holbrook v. New Jersey Zinc. Co., 57 N. Y. 632.

SECOND.

"*Whether the decision of the Supreme Judicial Court of Maine, in Joseph Dyer et al. v. Farmington Village Corporation, reported in the seventieth volume of Maine reports, should control the decision of this Court in this action.*"

In considering this question, it is to be observed, that there is no provision of the constitution of Maine prohibiting municipal corporations from aiding in the construction of railroads; that the decision of the Maine Court in the above case was not a construction of any local statute; that it was not a construction or interpretation of any provision of the constitution of Maine; that the meaning of no provision of the state constitution was considered or declared; that it was a decision upon these very bonds which had been negotiated more than five years previous to its announcement, and was not a rule previously established; that the settled doctrine of the Supreme Court of Maine had been, for many years prior to the issuing of these bonds, in favor of the constitutionality of legislation authorizing towns and cities to aid in the construction of railroads; that the decision of the Supreme Court of Maine in the above case rests on the ground that the act in question results in inequality of taxation and is therefore unconstitutional as violating sec. 8, art. IX of the constitution of Maine, which provides that "all taxes upon real estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof."

The act was held unconstitutional on the general ground, "of the want of constitutional power in the Legislature through any

agencies or by any means to create such inequality of taxation," (70 Me. 523.) Under these circumstances, we submit that the decision of the Supreme Court of Maine, holding the act authorizing the issue of these bonds to be unconstitutional, is not conclusive on this Court. In the language of this Court in Olcutt v. Supervisors, 16 Wall. 690,—"this is not a question of constitutional construction. It is a question of general law. * * * * The nature of taxation, what uses are public and what are private, and the *extent* of unrestricted legislative power, are matters which, like questions of commercial law, no State court can conclusively determine for us."

The language of this Court in Town of Venice v. Murdock, 92 U. S. 501, is applicable to this case:

"It is argued however that the New York decisions are judicial constructions of a statute of that State, and therefore that they furnish a rule by which we must be guided. The argument would have force if the decisions, in fact, presented a clear case of statutory construction, but they do not. They are not attempts at interpretation. * * * * * They assert general principles. * * * * * * There is, therefore, before us, no such case of the construction of a State statute by State courts as requires us to yield our own convictions of the right, and blindly follow the lead of others, eminent as we fully concede they are."

In this case the rights of *bona fide* holders of commercial securities are involved, and as stated by this Court in Township of Pine Grove v. Talcott, 19 Wall. 678,—"the question belongs to the domain of general jurisprudence. In this class of cases, this Court is not bound by the judgment of the Courts of the States. When the cases arise it must hear and determine for itself. Here commercial securities are involved."

Myer's Fed. Dec. sec. 1712, and cases cited.

The facts of this case seem to bring it within the principle laid down by this Court in one of its latest cases:

Carroll County v. Smith, 111 U. S. 562.

There, the Court after referring to the pendency of an injunction bill, which was held not to affect the title of the defendant

in error as a *bona fide* holder of the bonds for value, say that even if he had notice of the litigation, "that notice would have been merely of the question of law, of which, as we have seen, he is bound to take notice, at all events, and which is now for adjudication in this case." The Court further say, in answer to the argument that the decision of the State Court in that case was binding upon this Court:

"The decision is not a judgment of the Supreme Court of Mississippi construing the constitution and the laws of the State, which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply in the present case. It is a decision upon the very bonds here in suit, pronounced after the controversy arose, and between other parties. It was not a rule previously established, so as to have become recognized as settled law, and which of course all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the State, by which his rights are fixed and governed. It was to that very end that the constitution granted to citizens of one State, suing in another, the choice of resorting to a federal tribunal."

See also, Burgess v. Seligman, 107 U. S. 34, and cases cited.
Foote v. Johnson Co., 5 Dill. 281.

If the decision of the Supreme Court of Maine is not conclusive upon this Court, we come then to the consideration of the question:—

THIRD.

"*Whether the said act of the Legislature of Maine, authorizing the defendant corporation to make and issue the above mentioned bonds and coupons for the purposes aforesaid, is a valid and constitutional act under the provisions of the constitution of said State of Maine, and whether the bonds issued by the defendant under said act were valid and obligatory contracts.*"

In approaching the discussion of this question it is well to

bear in mind a principle of construction laid down in Railroad Co. v. County of Otoe, 16 Wall. 673.

Mr. Justice Strong there says:

"It is true that in construing the Federal Constitution, Congress must be held to have only those powers which are granted expressly, or by necessary implication, but the opposite rule is the one to be applied to the construction of a State Constitution. The Legislature of a State may exercise all powers which are properly legislative, unless they are forbidden by the State or National Constitution.

This is a principle that has never been called in question. If then the act we are considering was legislative in its character, it is incumbent upon those who deny its validity to show some prohibition in the Constitution of the State against such Legislation."

Unless the reasons assigned by the Supreme Court of Maine for holding this act unconstitutional are well founded in principle, this Court is justified in refusing to follow that decision.

The judgment of the Supreme Court of Maine is based upon the following propositions, as stated in the opinion, (see 70 Me. 522, *et seq.*):

(1) "That in this state such a tax, (viz: a tax for public purposes), cannot be constitutionally imposed upon a portion only of the real estate of a town. The question is one of power, and not how the power shall be exercised. We attach no importance to the fact, that in this case the territory to be taxed was first created into a territorial corporation. The objection to such a tax rests upon the want of constitutional power in the Legislature through any agencies or by any means to create such inequality of taxation. * * * * The result of all the cases is, that a local tax, * * * * cannot be made for a public purpose. The objection is to the inequality of taxation for public purposes, thereby produced, not to the machinery by which it is accomplished." pp. 522, 523.

Or, as summed up at the close of the opinion, p. 528:

"What we mean to say, is, that one public district cannot be created within another, nor be allowed to overlap another, so that for the same public purpose, or for any other public purpose, one portion of the real estate is taxed twice, while the remainder is taxed only once."

That it cannot be sustained as an assessment for a local improvement for two reasons:

(2) "For the reason that the purpose for which it is to be assessed is public, not local; that no tax in aid of a railroad has ever been justified or sustained upon the ground that it is an assessment for a local improvement." p. 527.

(3) "That if this tax is assessed it must, by the terms of the act authorizing it, be assessed upon the basis of valuation, and will be laid upon all the taxable property within the limits of the village corporation, whether the extension of the railroad was beneficial to it or not. That local assessments for local improvements cannot be laid upon the basis of valuation alone, without regard to benefits."

By the express language of the act of incorporation, (Record p. 13), the Farmington Village Corporation became "*a body politic and corporate*, with all rights and privileges provided by the general laws of the State relating to corporations."

The territory thus incorporated included about 480 acres, and 1200 inhabitants (Record p. 13).

That the Farmington Village Corporation is a *municipal corporation*, within the meaning of those terms, there can be no question.

In an early case a municipal corporation is defined to be "an investing the people of a place with the local government thereof." Salkeld, 183.

This definition was adopted by the court in People v. Morris, 13 Wend. 325, and quoted by Campbell, C. J. in People v. Hurlburt, 24 Mich. 44.

Judge Dillon, in his work on Municipal Corporations, sec. 9, says, "Municipal corporations are bodies politic and corporate, established by law, to share in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town or district which is incorporated. * * * The primary and fundamental idea of a municipal corporation is an agency to regulate and administer the internal concerns of a locality in matters peculiar to the place incorporated, and not common to the state or people at large."

He further says, sec. 10:—"The phrase *municipal corporations* in the contemplation of this treatise, has reference to *incorporated villages*, towns and cities, as distinguished from other public corporations, such as counties and quasi corporations."

The legislative control over *municipal corporations* is supreme and transcendent; it may alter or abolish them, erect new corporations in the place of the old and add to or carve out of the old a new corporation. Dillon on Mun. Corp., sec. 37.

That the Legislature of a state has power, unless restrained by its organic law, to authorize *municipal corporations* to issue bonds in aid of a railroad and to levy a tax to pay these bonds and the interest on them, has often been decided by this court.

County of Otoe v. Baldwin, 111 U. S. 15.
Township of Pine Grove v. Talcott, 19 Wall. 676.
Thompson v. Lee County, 3 Wall. 327.

No distinction is made between village corporations and other municipal corporations, they are all creatures of legislative action, and derive their powers from the same source.

In the case of Bank of Rome v. Village of Rome, 18 N. Y. 43, the court say, in discussing the power of the Legislature in creating such corporations:—

"Even if a court could properly enter upon this inquiry, no judge would, I think, venture to state a more restrictive rule than that the powers conferred on a municipal corporation must relate to the public interests of the territory, or body of persons within its limits. Taking this definition, can a court say that a railroad terminating at a village or city is so foreign to its public interests, and those of its inhabitants, that it is beyond the legislative power to authorize the village or city to become interested in its construction? The general judgment of men is, we all know, that a railroad so terminating does, or at least may, add to the value of the property and contribute to the convenience of the inhabitants of any place. If, therefore, we were at liberty to judge of this question, we could not come to the conclusion that the power to subscribe for stock in this railroad was entirely foreign to and unconnected with the public interests of the village of Rome."

In Township of Pine Grove v. Talcott, 19 Wall. 676, this court said:

"Unless prohibited from doing so, a municipal corporation has the same power to aid in their construction as to procure water for its water works, coal for its gas works or gravel for its streets from beyond its territorial limits. * * * * * It does not belong to courts to interpolate constitutional restrictions."

See also, Merrick v. Amherst, 12 Allen 507.

There is nothing in the constitution of Maine which prohibits such legislation or restricts the exercise of legislative power in the creation of Municipal Corporations, and the distinction which the Supreme Court of Maine has attempted to establish between towns or cities and village corporations, we believe to be illogical and unsupported by any authority in the State or Federal Courts.

(1) The principal objection stated by the court is that such legislation produces inequality in taxation, and that such a tax cannot be sustained either as a general tax for public purposes or as an assessment for a local improvement.

It may be said that taxation in aid of railroads partakes of a twofold character, as being for both a general and a local purpose, inasmuch as railroads are of general benefit as public highways, while conferring special benefits on particular localities.

That the state may establish highways or avenues to markets by its own direct action, or may empower or direct one of its municipal divisions to establish them or aid in their construction, has been decided by this court in Railroad Company v. County of Otoe, 16 Wall. 673; but when the Legislature has employed the instrumentality of municipal corporations for such purpose, the question of local benefit becomes important in considering the constitutionality of such legislation.

Thus Judge Cooley says that its constitutionality "must rest upon the same right which allows such municipality to impose burdens upon their citizens to construct local streets or roads, and they can only be defended on the ground that the object to be accomplished is so obviously connected with the municipality

and its interests, as to conduce obviously and in a special manner to their prosperity and advancement."

Cooley on Const. Lim. *214.

It is well settled that constitutional restrictions as to uniformity in taxation, such as that contained in the Constitution of Maine, apply only to general taxation as distinguished from taxation for local purposes.

See Emery v. Gas Co., 28 Cal. 345.
Dillon on Mun. Corp., 1st ed., secs. 594, note 5, 599.
Cooley on Const. Lim. *498.
Cooley on Taxation, pp. 132—144.
Dorgan v. Boston, 12 Allen 223—334.

Considered as a tax for public purposes which the state might levy upon citizens at large, the Legislature has the power to apportion and impose the duty, or confer the power of assuming it upon the municipal divisions of the state; and such a tax is no violation of the constitutional provisions relating to uniformity of taxation.

In Township of Pine Grove v. Talcott, 19 Wall. 675, this court said:

"The uniformity must be co-extensive with the territory to which the tax applies. If a State tax, it must be uniform all over the State. If a county or city tax it must be uniform throughout such county or city. But the rule does not require that taxes for the same purposes shall be imposed in different territorial subdivisions at the same time. If so, a county could not levy a tax to build a court house, jail or infirmary without rendering it necessary for every other county in the State to do the same thing without reference to the different circumstances of each one. So here, one township through which the railroad was to pass, expecting to be largely benefited by its construction, might give its bonds and impose the tax requisite to meet the principal and interest, while another township similarly situated might refuse to do so. The rule would have no application to the latter."

Viewed as an assessment for a local improvement, we contend that such a tax is subject to none of the objections stated by the Supreme Court of Maine. Some of these are peculiar and not

easily to be reconciled with well-settled principles. Thus the court, on p. 525 of the opinion, says: "The result of all the cases is, that a local tax, (by which is meant a tax assessed upon a community or territory which is less than that on which the general assessment for other public purposes is made,) cannot be made *for a public purpose.*"

We respectfully submit that this proposition is not sound, but that on the contrary, all taxes, whether local or general, must be for a public purpose. The principle is well stated in Jones on Railroad Securities, sec. 223:

"It is a fundamental principle that the power to levy taxes can only be used by municipal corporations for public purposes, and it is equally well settled that the building or extension of a railroad is such a public purpose."

This has been repeatedly decided by this court.

In Railroad Company v. County of Otoe, 16 Wall. 676, this court said:

"But if a State can directly levy taxes to make donations to improvement companies, or to other objects which in the judgment of its Legislature it may be well to aid, it will be found difficult to maintain that it may not confer upon its municipal divisions power to do the same thing. Counties, cities and towns are only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will. When they are authorized or directed to levy a tax or to appropriate its proceeds, the State through them is doing indirectly what it might do directly. It is true that the burden of the duty may thus rest upon only a single political division, but the Legislature has undoubted power to apportion a public burden among all the taxpayers of a State or among those of a particular section. In its judgment those of a single section may reap the principal benefit from a proposed expenditure, as from the construction of a road or bridge, an almshouse or a hospital. It is not unjust therefore that they should alone bear the burden. This subject has been so often discussed, and the principles we have asserted have been so thoroughly vindicated, that it seems to be needless to say more or even to refer at large to the decisions."

See also, Olcutt v. The Supervisors, 16 Wall. 697.
Loan Asso'n v. Topeka, 20 Wall. 659.

In Sharpless v. Mayor of Phila., 21 Penn. St. 147, the court says:

"The State has a clear constitutional right to allow a particular portion of the people to tax themselves to promote the building of a railroad in which they have an interest."

See also, Cooley on Const. Lim. *214.

We respectfully submit that the Legislature has as much power to authorize a village corporation to aid in the building of a railroad as it has to authorize a town to do so, and that the inequality in taxation is no greater in the one case than in the other. Towns remain subject to County and State taxation in addition to the burden of town taxes proper, the same as a village corporation may remain subject to certain town charges in addition to the special matters for which it is authorized to levy taxes, and such inequality is not within the prohibition of the constitution. The taxation of those towns that aid in the construction of a railroad is necessarily greater than that of towns on the line of the railroad which contribute no aid, while all may share in the benefits of its construction, yet the objection of inequality in taxation has never yet prevailed to defeat such legislation in the State of Maine, which has repeatedly pronounced upon its constitutionality.

Judge Cooley in his work on Taxation, p. 127, says:

"Perfect equality in the assessment of taxes is unattainable, approximation to it is all that can be had. * * * It is only where statutes are framed which impose taxes upon false or unjust principles, or operate to produce gross inequality, so that they cannot be deemed in any just sense proportional in their effect on those who are to bear the public charges that courts can interfere and arrest the course of legislation by declaring enactments void."

"Equality can never be but approximation," says Redfield, J., in Allen v. Drew, 44 Vt. 174.

"Perfectly equal taxation will remain an unattainable good as long as laws and government and man are imperfect," says Sharswood, J., in Grim v. School District, 57 Penn. St. 433.

See also, Com. v. Sav. Bank, 5 Allen 428.
Lowell v. Oliver, 8 Allen 247.

In Connor v. Fulsom, 13 Minn. 219, the court says:

"It is generally true that a city, town or county, in expending money for the advancement of its own local interests either directly or indirectly benefits some other sub-division of the State. If it builds a road or bridge, *or aids in building a railroad*, or in making any other public improvement, from which benefit to itself is expected to accrue, frequently some other sub-division of the State is directly and equally benefited; but it has not been considered that this would be a legal objection to an appropriation or tax for such improvement."

The selection of a taxation district is a matter of legislative discretion which is not subject to the control of the courts. There is no implied restriction on legislative power confining its operation to towns and excluding village corporations. Both are mere creations of legislative will and equally subject to its action. As said by this court in Meriwether v. Garrett, 102 U. S. 472:

"Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the Legislature may confer, and these may be enlarged, abridged or entirely withdrawn at pleasure. This is common learning found in all adjudications on the subject of municipal bodies, and repeated by text writers."

(2) The Supreme Court of Maine further says, opinion p. 528: "What we mean to say is that one public district cannot be created within another, nor be allowed to over-lap another, so that for the same public purpose, or for any other public purpose, one portion of the real estate is taxed twice while the remainder is taxed only once."

The principle here laid down by the Supreme Court of Maine is opposed to the almost uniform current of decisions on the subject.

We contend that the Legislature has power to create one district within another for purposes of taxation and that for certain purposes real estate may be taxed twice, viz: once for general purposes in common with other political subdivisions of the State, and again for a public purpose which confers, in the judg-

ment of the Legislature, special benefits on the locality taxed, and that the action of the Legislature in this respect, is not controllable by the courts.

In Dorgan v. Boston, 12 Allen 223, the court says:

"The great and essential attribute of sovereignty would be greatly abridged if it should be held that the Legislature are restricted in their authority to provide means by the levying of taxes for those objects only, which would form a proper subject of a general charge on the whole people of the Commonwealth, and have no power to authorize assessments for objects of a local character the execution of which is required by the convenience and necessities of a town or district or neighborhood. * * * * Nor can it be contended that the constitution, in regard to this species of taxation, furnishes any fixed rules of proportion or gives any absolute standard by which to determine whether a particular tax is within the limits of the legitimate exercise of the power granted. Undoubtedly a very wide discretion was intended to be left to the Legislature as to the subjects and methods of executing the authority conferred upon them of imposing taxes for other than a general nature."

In Cooley on Taxation, p. 112, the principle is stated as follows:

"The Legislature judges finally and conclusively upon all questions of policy, as it may also upon all questions of fact which are involved in the determination of a taxing district. And having the authority to determine what shall be the taxing districts the Legislature must also be left to its own methods of reaching the conclusion. Most cases will be settled by general law; but taxes for extraordinary purposes may require special legislation, or at least may justify it. * * * * That the Legislature may establish taxing districts, independent of county or township, or boundaries of political subdivisions, see Malchus v. Highlands, 4 Bush. 547; Shelby County v. Railroad Co., 5 Bush. 225; Shaw v. Dennis, 5 Gilm. 405; People v. Hawes, 34 Barb. 69."

Also p. 113:

"Taxing districts may be as numerous as the purposes for which taxes are levied. The district, for a single highway, may not be the same as that for the school house located upon it. It is not essential that the political districts of the State shall be the same as the taxing

districts, but special districts may be established for special purposes, wholly ignoring the political divisions. * * * * The benefits of a highway, a levee or a drain may be so peculiar that justice would require the cost to be levied either upon part of a township or county, or upon parts of several such sub-divisions of the State. The political divisions of the State are necessarily regarded in taxation only when the tax itself is for a purpose specially pertaining to one of them in its political capacity, so that, as already stated, the nature of the tax will determine the district. * * * Even when the purpose for which a tax is demanded pertains to the State at large, or to one of its divisions, so that a general levy throughout the State or such division is essential, there may be peculiar reasons why a part of the general public, who are concerned in the purpose, should bear a proportion of the burden greater than that which should be borne by the others. A pertinent illustration might, perhaps, be the case of a tax for the constuction of a State capital. * * * This doctrine has been applied in Pennsylvania to the case of a county town, which in addition to its proportion of the County levy was specially assessed for the expense of constructing a court house and jail. (Gibson Ch. J. in Kirby v. Shaw, 19 Penn., St. 258.) * * * * In the State of New York it has also been applied to a State work of public improvement—a canal—which conferred, or was likely to confer, local benefits on a locality specially taxed, (Thomas v. Leland, 24 Wend. 65; Harbor Commissioners v. State, 45 Ala. 399.)"

(3) It is no valid objection to the tax authorized in this case, that it must be assessed upon all the taxable property within the limits of the village corporation upon the basis of valuation. The extent of the taxation district, and the basis on which the tax shall be apportioned, are matters of legislative discretion, and are not subject to the control of the Courts, in cases where a special assessment is on principle justified. Where the improvement, in aid of which the tax is assessed, is of general benefit to the business and property situated within the corporate limits, as in this case, it is both just and proper that the tax should be assessed upon all taxable property according to its valuation.

See Merrick v. Amherst, 12 Allen 501.

Hagar v Reclamation District 111 U.S. 701, 705
Cornely of Mobile v Kimball 102 U.S. 691, 704

Such an apportionment is a legal exercise of the legislative discretion, and is not open to the objection that it is made without regard to benefits.

These positions are fully sustained by the authorities, which are collected in Cooley on Taxation, p. 457, *et. seq.* The learned author states the result as follows:

"When, however, an exceptional assessment is levied upon a municipality, for the special benefits its people receive from a public building or other work of the State, or of some large sub-division of the State, the benefits are usually quite as much to business as to real property, and the burden would not be equally distributed if the assessment were not laid on *all* property subject to ordinary taxation. This course has been ordinarily adopted." * * * * "It is conceded that the legislative judgment that a certain district is, or will be, so far specially benefited by an improvement as to justify a special assessment, is conclusive, and that its determination as to what shall be the basis of the assessment is equally conclusive.

"To invoke the intervention of a court for relief against the results of its conclusion, is to invoke the judicial authority to give its judgment controlling effect over that of the Legislature in the matter of the apportionment of a tax which, by concession on all sides, is purely a matter of legislation." * * * * "The legislative authority, either of the State, or, when properly authorized, of the municipality, may determine over what territory the benefits are so far diffused as to render it proper to make all lands contribute to the cost. * * * * The whole subject of taxing districts belongs to the Legislature; so much is unquestionable." * * * *

"As in the case of all other taxation, it may sometimes happen that the expenditure will fail to realize the expectation on which the levy is made; * * * * but the liability of a principle to erroneous or defective application cannot demonstrate the unsoundness of the principle itself, and that which supports special assessments is believed to be firmly based in reason and justice."

We have thus passed, in review, the positions by which the Supreme Court of Maine, speaking through four only of its eight members, has sought to sustain its conclusion, that the act of the Legislature authorizing the issue of these bonds was unconstitutional and void—a conclusion which we believe is

not in harmony with the decisions of the United States Courts, nor consonant with well-established principles of law.

The local character of the improvement for which this tax was authorized is much more apparent than is ordinarily the case where municipal aid is extended to railroads. Here the improvement was the extension of a railroad from one side of the river to the other, so as to bring its terminus within the limits of the village corporation. It was strictly local in its character, and for the special benefit of the village corporation. The town of Farmington, which lies on both sides of the river, was in the main well accommodated with the depot on the West side of the river, but the future prosperity and growth of the village corporation depended upon an extension of the railroad to the East side of the river within their own limits, an advantage for which the inhabitants were willing and might justly be called upon to pay.

The evidence shows that the vote in favor of aiding the extension by the issue of bonds was almost unanimous, "one vote only dissenting and voting nay." (See Record of Meeting, Feb. 25, 1870.) The action of the village corporation has been more than justified by the benefits which it has received in growth and business prosperity from the extension of the railroad into its own territory. According to the special finding of facts, (Record p. 23,) "the extension of the railroad has proved of great benefit to the village corporation, and the increase of its valuation since it was constructed has largely exceeded the rate of increase of the rest of the town."

The language of Mr. Justice Swayne, in Commissioners v. Bolles, 94 U. S. 110, is peculiarly applicable to this case. In announcing the decision of the Court, sustaining the validity of the bonds in issue in that action, he says:

"This leads to an affirmance of the judgment. Happily, such a result is in accordance with the plainest justice. The case is not one in which the municipality has incurred a debt, without securing the object sought by it. Popular votes approved the issue of the bonds to further the construction of the railroad, which has been completed, and which the County now enjoys. The bonds have not been misap-

propriated or squandered. They have been applied to the purpose for which they were made. * * * * Common honesty demands that a debt thus incurred should be paid."

We therefore ask that the judgment of the Circuit Court may be affirmed.

CHARLES F. LIBBY,

Of Counsel.

In the Supreme Court of the United States.

October Term 1884.

In the matter of the Petition of ELLIS G. HUGHES for a Writ of Mandamus directed to the Honorable Matthew P. Deady, as Judge of the Circuit Court of the United States for the District of Oregon.

MOTION FOR LEAVE TO FILE PETITION.

Now comes Ellis G. Hughes, of the city of Portland, in the State of Oregon, by his counsel, John H. Mitchell, and moves the Honorable the Supreme Court of the United States for leave to file his petition herein (printed copy herewith attached, and made part of this motion) praying the issuance out of this Honorable Court of a writ of mandamus directed to the Honorable Matthew P. Deady as Judge of the Circuit Court of the United States for the District of Oregon, for the reasons and purpose as fully set forth in said petition.

JOHN H. MITCHELL,
Counsel for Ellis G. Hughes.

In the Supreme Court of the United States.
October Term 1884.

To the Honorable the Supreme Court of the United States:

Your petitioner, Ellis G. Hughes, of the city of Portland, in the State of Oregon, for cause of this his petition would most respectfully allege and show unto your Honors:

That your petitioner is an attorney-at-law, duly admitted and practicing in the courts of the State of Oregon and in the Circuit and District Courts of the United States within and for the District of Oregon.

That on and prior to the 3d day of May, 1882, there was pending in the Circuit Court of the United States within and for the District of Oregon a certain suit in equity, in the nature of a suit for the foreclosure of a certain mortgage on real property, and for other relief, and in which William Reid, manager, was plaintiff, and H. McCallister and W. B. McCallister, with others, were defendants.

That since the commencement of said suit, up to and on the said 3d day of May, 1882, and continuously up to the present time, your petitioner has been and he is now the duly authorized, empowered, and acting attorney and counsel of the plaintiff in said suit, for the conduct and management of the same for and on behalf of, and as the attorney-at-law of, the plaintiff therein.

That on the said 3d day of May, 1882, on a proper case made and shown, the plaintiff therein, William Reid, manager, recovered in said suit a certain decree as against the defendants, H. McCallister and W. B. McCallister, and a certain order of sale, wherein and whereby it was ordered, adjudged, and decreed that the defendants, H. McCallister and W. B. McCallister, should pay to the plaintiff a certain sum of money, and interest as therein specified, and also the costs and disbursements in the suit to be taxed, "including ten per cent. on the full amount due from the de-

fendants, H. McCallister and W. B. McCallister, to the complainant, as an attorney's fee to the attorney of the complainant," and that in default of such payment being made that certain lands in said decree and order of sale set out and described be sold.

That your petitioner, as the attorney of the plaintiff, by express agreement and by the express terms and conditions of said decree and order of sale, was the absolute and unconditional owner of the attorney's fee recovered therein and thereby as part of the costs of said suit, and also had a certain claim on said decree as for cash paid out by him in the way of the payment of the expenses of conducting said suit and obtaining said decree as for items as for which a general recovery was had therein as for costs and disbursements to be taxed, and that your petitioner, ever since the recovery of said decree up to the present time, has continued to be, and, with the exception of payment of part thereof to him, as hereinafter set out, is now, the absolute and unconditional owner of the attorney's fee recovered in said decree as aforesaid, and has now his claim as for cash paid out by him as aforesaid.

That on the 17th day of October, 1884, the lands set out and described in said decree and order of sale, and therein and thereby ordered to be sold, were sold as in and by said decree and order of sale directed to be done.

That the purchaser at said sale was the Dundee Mortgage and Trust Investment Company (limited), the corporation of which the said William Reid, the plaintiff in said suit, had been manager, and for whom he acted in carrying on said suit, and which was the real owner of said decree and order of sale in said suit had and recovered.

That as a matter of fact no money was paid on said sale, but the amount bid was applied in payment of the amount due the said corporation, the real owner of the claim sued on and recovered on in said suit as aforesaid, except that the said corporation paid the costs of said sale

in cash; and that on the 3d day of December, 1884, the said sale so as aforesaid made standing at that time as confirmed, and the amount due your petitioner under said decree and order of sale as for his attorney's fee and the costs paid by him having been regularly ascertained and determined, the said purchaser at said sale paid to the clerk of the Circuit Court of the United States for the District of Oregon—the court in which said decree and order of sale was recovered as aforesaid—as and for and in payment of the claim of your petitioner for his attorney's fee and the costs and disbursements paid by him as aforesaid, the full amount so as aforesaid ascertained and determined to be due to your petitioner therefor.

That by Rule No. 20 of said court it is provided as follows: "Money brought or paid into court shall be delivered to the clerk, who, unless he immediately pays the same to the party entitled to receive it, shall deposit it in the name and to the credit of the court with such depositary as may be designated by law or by the order of the court." And the said clerk of said court did deposit the money so as aforesaid paid to him in payment of the amount due your petitioner with the First National Bank of Portland, that being the duly designated depositary, to the credit of the court.

That Rule No. 21 of said court is as follows: "Money deposited as provided in Rule 20 shall only be paid out on an order signed by the clerk and countersigned by a judge of the court."

That on the 4th day of December, 1884, your petitioner, having learned that the said money had been so paid in in payment of his claim as aforesaid, did apply to and request the clerk of said court to pay said money to him, but was by said clerk informed that he had no power to draw or pay the same, except on an order signed by Matthew P. Deady, the then present and acting judge of said court.

That your petitioner did apply to and request the said

Matthew P. Deady to, as judge of said court, sign an order for the payment of said money to him, but that he, the said Deady, did refuse to take any action in the matter, except on a motion duly and regularly filed in writing and heard in open court.

That thereupon and on said 4th day of December, and after said refusal to sign said order, your petitioner did make in writing, and did file in said United States Circuit Court, his certain motion asking that the money so paid in as and in payment of his attorney's fees, and costs and disbursements paid by him as aforesaid, be paid over to him; and on the 5th day of December, 1884—the said United States Circuit Court being then in session, with the said Matthew P. Deady presiding as judge thereof—did bring said motion on to be heard; whereupon it was ordered by said court that all of said sum so as aforesaid paid in as and for your petitioner be paid to your petitioner, save and excepting the sum of $500, that is to say: There being then in the depository of said court, and belonging to your petitioner, the sum of $1,019.04, the said court did make an order that there be paid to your petitioner the sum of $519.04, but did refuse, and ever since has refused, and does now refuse, to order the other $500 to be paid to your petitioner, though your petitioner did again, on the 12th day of December, 1884, apply to the court when in session for an order for the payment of said money to him. And the said Matthew P. Deady, the only judge of said court now holding or conducting said court, though repeatedly applied to by your petitioner, and requested to sign an order for the payment of the said sum of $500 to your petitioner, such as is necessary for the withdrawing of the same from the depository of said court, under Rule 21 of said court, as hereinbefore set out, always has, and does now, refuse to sign such order.

That there are no proceedings of any kind or nature whatsoever brought by any one, or now pending in said

court or in any other court, and under or by which any claim is made on said sum of $500 now in the depository of said court, or in, under, or by which any manner of objection or exception is made by any one to the payment of said sum to your petitioner, but that the said Matthew P. Deady, in his capacity of judge of said court, and acting for and as said court when it is in session, does arbitrarily and of his own motion refuse to sign or countersign the order necessary to enable your petitioner to withdraw his money from the depository of the said court.

That the said sum of $500 now in the depository of said United States Circuit Court for the District of Oregon as aforesaid is absolutely and unconditionally the property of your petitioner, and he is entitled to have the same paid to him without any let, drawback, or hindrance whatsoever.

That the clerk of said court has always heretofore been, and is now, ready and willing to prepare and sign the order necessary to enable your petitioner to withdraw his money from the depository of said court, but that your petitioner cannot draw his money without the signature of the said Matthew P. Deady to said order; and, as hereinbefore set out, he refuses to sign the same.

That the said money of your petitioner being now in the custody of said court, your petitioner is powerless to recover the same, unless your honors will grant unto him the writ of mandamus of the United States, directed to the said Matthew P. Deady, directing him, as judge of said court, to sign as such the order necessary to enable your petitioner to draw the same from the depository of said court.

Wherefore your petitioner prays that your honors will, in consideration of the premises, award the United States writ of mandamus, directed to Matthew P. Deady as judge of the Circuit Court of the United States for the District of Oregon, commanding him that he do forthwith sign

and execute, by signing or countersigning any and all such orders, matters, and things as may be requisite or necessary to enable your petition to withdraw from the depository of said court the sum of $500, belonging to him as hereinbefore set out, and wrongfully detained therein by reason of the said Matthew P. Deady refusing to sign or countersign the order by the rules of said court necessary for the drawing of the same, and that your petitioner may recover of the said Matthew P. Deady his costs and disbursements herein.

JOHN H. MITCHELL,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
District of Oregon, State of Oregon.

I, Ellis G. Hughes, being duly sworn, on oath do say that I know the contents of the foregoing petition, and all the facts therein set out and contained, and that the same is true.

ELLIS G. HUGHES.

Subscribed and sworn to before me this 26th day of December, 1884.

[SEAL.]

J. R. STODDARD,
Notary Public in and for Oregon.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

NO. 8, ORIGINAL.

EX PARTE, IN THE MATTER OF ELLIS G. HUGHES, PETITIONER.

ON PETITION FOR A WRIT OF MANDAMUS.

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1 *Return to rule to show cause.*

Now at this day comes Matthew P. Deady, the respondent in the above entitled matter, and shows cause why a writ of mandamus should not issue, as prayed for in the petition herein, as follows:

On November 25, 1879, H. McCallister and W. B. McCallister, of Marion County, Oregon, borrowed of William Reid, manager, of Portland, Oregon, the sum of $7,000, and gave their promissory notes therefor and the interest to accrue thereon, payable in eleven instalments, the first note being for $709.60, and payable on December 1, 1880, and at the same time and as a security for the payment of said notes, they and their respective wives, Julia and Mariam, executed and delivered to said
2 Reid a mortgage upon three parcels of land in said county, containing 408, 320, and 160 acres, respectively, subject to a prior mortgage on the north 220 acres of the first parcel, to secure a debt due Eliza E. Dickson; and said mortgage contained a provision that in case default was made in the payment of any of said eleven notes, then, and in that case, the whole debt was to become due and payable at the option of the mortgagee, and bear interest at the rate of 12 per centum per annum, and that "there should be recovered in any suit or proceeding to foreclose said mortgage as part of the costs thereof an attorney fee of ten per centum on the full amount fou'd due."

Default was made in the payment of the first note, and on January 1, 1881, the whole debt, then amounting to $7,775.90, was declared due.

On August 17, 1881, the mortgagee received from an insurance company, $1,000 on account of said debt for the loss of a house on the premises by fire; and prior to the commencement of the suit to fore-
3 close this mortgage the north 220 acres of the first parcel of land was sold to satisfy a decree obtained by said Dickson in a suit to enforce the lien of her mortgage thereon.

On September 21, 1881, Reid commenced a suit in the United States circuit court for the district of Oregon, by his attorney, the petitioner, against the parties to said mortgage of November the 25th, and sundry subsequent incumbrancers, to enforce the lien of the same by a sale of the premises, in which default was made by all the defendants, except Julia, the wife of H. McCallister, who, on December 3, 1881, answered the bill,

setting forth that she was the owner of the south 204 acres of said first mentioned parcel of land, and could neither read nor write, and alleging that she signed said mortgage without knowing that her land was included therein, and upon the express representation of the agent of the petitioner, who procured her to sign the same, and took her acknowledgment thereof, that it was not; to which answer a general replecation was filed on February 14, 1882.

On March 29, 1882, a decree pro confesso was taken in said suit against all the defendants, except said Julia, and on May 3 thereafter, a
4 decree was taken against the makers of said notes for the sum of $7,364.08, with interest at 12 per centum per annum from August 1, 1881, and costs of suit, "including ten per centum on the full amount due from the defendants, H. McCallister and W. B. McCallister, to the complainant, as an attorney's fee, to the attorney of the complainant," and that in default of payment thereof, all the interest of said defendants and their wives in the second and third mentioned of said parcels of land, be sold by the master, as upon an execution at law, who should report his "proceedings on such sale" within ten days thereafter; that on October 17, 1884, the master put the premises up at auction, as directed by the decree, when The Dundee Mortgage & Trust Investment Company became the purchaser of the same at $2,000, and paid the master thereon the expenses of the sale, amounting to $72.20, but claimed the right, as the real owner of the mortgage and decree, to retain the remaining $1,927.80, and apply the same on the latter, which claim was acquiesced in by the master.

On October 28, 1884, the petitioner filed a petition in said circuit court, stating in substance the facts aforesaid, and asking that
5 the master and said company be required to show cause why the sum of money for which said property was sold to the latter should not be paid over to the master and brought into court, or the sale set aside and the property resold; that on November 10th the master and company showed cause and the matter was heard before the respondent, when it appeared that the plaintiff Reid took the notes and mortgage aforesaid, as the agent and manager of said company, and that on April 7, 1883, he duly assigned the same to it; that the petitioner, at and before the commencement of the suit aforesaid and the execution of said mortgage, was the regular attorney of said company in and about the business of loaning money in Oregon, in which it was then engaged, and, as such attorney, expressly undertook that the title of the mortgagors to the premises mentioned in said mortgage was good in law, and that the same were not incumbered, except by the Dickson mortgage aforesaid, and that the mortgage
6 was in legal form and duly and truly executed; that at and before the commencement of said suit said petitioner had a contract with said company, by the terms of which he was to have the right to foreclose said mortgage and all others taken by him for it, and receive therefor the attorney's fee allowed by the decree of the court in each case, but was not to be entitled to the same until the debt and costs found due the company had been paid or made out of the property mortgaged.

And that afterwards, in the year 1882, a disagreement occurred between the petitioner and the company, and the latter refused to be bound any longer by said contract or to recognize the petitioner as its attorney, and refused to furnish him with the mortgage in said suit, so that he might take testimony

therein and prepare the same for a final hearing, as between the company and said defendant Julia; whereupon it appearing to the respondent that the only matter in dispute between the parties was the disposition or application of the sum claimed by the petitioner, as an attorney fee and costs, the company maintaining that the petitioner was not entitled
7 to receive any portion of the proceeds of the sale of the property, as an attorney fee or otherwise, until its claim against the mortgagors was satisfied, nor until he had prosecuted said suit to a final decree, as against all the defendants therein, to which the petitioner replied that the company having refused generally to be bound by the contract, under which its debt was to be preferred to his fee, could not have the benefit of it in this case as against the petitioner, and that he was ready and willing to prosecute said suit to a final determination whenever the company would permit him, an order was made on November 24th that said sale be set aside and the property resold, unless the company within ten days thereafter paid into court, "subject to the further order of the court," the sum of $799.25 with interest thereon from the date of said decree, in all the sum of $959.10, together with $17.80 disbursed by the petitioner in said suit, and the docket fee of $20 allowed by the statute, and
8 the costs and disbursements of that proceeding, taxed at $22.14.

On December the 4th, the petitioner made an application to said circuit court, stating that said company had paid therein, in pursuance of the order aforesaid, the sum of $1,039.42, and asked that the same might be "paid to him by the clerk," whereupon this respondent made an order in said court "that there be paid to said Hughes (the petitioner) out of said funds (the $1,039.42 aforesaid) the sum of $519.04," which amount was afterwards received by the petitioner from the depositary of the court on an order or draft signed by the clerk and countersigned by the respondent; but this respondent declined to make any disposition of the rest of said fund until the company had notice of said application and could be heard thereon; that on December 12th said application was further heard in said court before this respondent, and it appearing from the admissions of said petitioner and company then and there made, that said suit
9 was not yet prosecuted to a final determination, and that as to the land belonging to the defendant Julia included in said mortgage, it stood on the bill, her answer and the replication thereto, and also that the company had requested the petitioner to prosecute said suit to a final determination, which he was ready and willing to do, and it appearing to the respondent that although the decree already given in the suit may have definitively settled the amount of the petitioner's compensation for attending to the same, although $500 is an ample allowance therefor, yet neither by the terms of said decree nor the right and justice of the case was he entitled to the same until he had earned it, by prosecuting said suit to a final decree as to all the defendants therein, and therefore denied said application and left said fund in the registry of the court to be disposed of or applied hereafter as the rights of the parties and the justice of the case may require.

10 And the respondent, further answering, shows and avers that it is not true as stated in said petition that any sum of money was ever paid into said circuit court "in payment of the claim of the petitioner for his attorney's fee," but the truth of the matter is, that a sum

equal in amount to said claim was paid into said court, in pursuance of the order thereof, as aforesaid, there to be kept, disposed of, and applied in said suit, as said court might afterwards determine and provide; nor is it true, as in said petition alleged, that the clerk of said circuit court was ever ready or willing to sign an order on the depositary of said court for the payment of said sum to the petitioner under Rule 20 thereof, which order is in effect a mere check or draft on said depositary; nor is it true, as alleged in said petition, that the respondent was ever asked to countersign any such order, or that he refused to do so, for the sufficient reason that there is not now nor never was any money in the registry of
11 said circuit court subject to be drawn out on the order of its clerk under said Rule 20 for any such purpose, but said $500 remains in the registry of the court in the same condition as when it was received there, subject to the judicial action and judgment of said court, and not to the mere check or draft of the clerk countersigned by any judge thereof.

And the respondent respectfully submits, the premises considered, that it is a matter within the judgment of said circuit court, whether the balance of the fee claimed by the petitioner in said suit shall be paid to him out of this fund before the same is ended and the fee fully earned, or whether, in case the defence of said Julia to said bill shall prevail, and the company shall lose so much of its debt, by reason of the negligence or misconduct of the petitioner, in taking such mortgage, it should be
12 paid to him at all, but applied on said debt, and therefore the *therefore the* respondent ought not to be required by a writ of mandamus from this honorable court, to allow said claim and make an order for its payment contrary to his judicial judgment; wherefore he humbly prays to be hence dismissed without day, and that he may have judgment against the petitioner for his costs and disbursements in this behalf most wrongfully sustained.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

J. N. DOLPH,
Counsel for Respondent.

DISTRICT OF OREGON:

I, Matthew P. Deady, being first duly sworn, do depose and say that the foregoing answer is true, as I verily believe.

MATTHEW P. DEADY.

Subscribed and sworn to before me this February 18, 1885.

[SEAL.] R. H. LAMSON,
Clerk U. S. Circuit Court for Oregon,
By G. G. GAMMANS,
Deputy.

(Indorsed:) Supreme Court U. S., 1884. October term. No. 8, orig'l. Ex parte: In the matter of Ellis G. Hughes, petitioner. Return to rule. (Stamped:) Office Supreme Court U. S. Filed Feb. 26, 1885. James H. McKenney, clerk.

FILED
MAR 26 1885
JAMES H. McKENNEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1884.

No. 8. Original.

Ex Parte, In the Matter of the Petition of ELLIS G. HUGHES for a Writ of Mandamus.

DEMURRER TO SUFFICIENCY OF THE RETURN

BRIEF AND ARGUMENT

OF

JOHN H. MITCHELL,
Counsel for Petitioner.

THOMAS MCGILL & CO., Law Printers, Washington, D. C.

equal in amount to said claim was paid into said court, in pursuance of the order thereof, as aforesaid, there to be kept, disposed of, and applied in said suit, as said court might afterwards determine and provide; nor is it true, as in said petition alleged, that the clerk of said circuit court was ever ready or willing to sign an order on the depositary of said court for the payment of said sum to the petitioner under Rule 20 thereof, which order is in effect a mere check or draft on said depositary; nor is it true, as alleged in said petition, that the respondent was ever asked to countersign any such order, or that he refused to do so, for the sufficient reason that there is not now nor never was any money in the registry of
11 said circuit court subject to be drawn out on the order of its clerk under said Rule 20 for any such purpose, but said $500 remains in the registry of the court in the same condition as when it was received there, subject to the judicial action and judgment of said court, and not to the mere check or draft of the clerk countersigned by any judge thereof.

And the respondent respectfully submits, the premises considered, that it is a matter within the judgment of said circuit court, whether the balance of the fee claimed by the petitioner in said suit shall be paid to him out of this fund before the same is ended and the fee fully earned, or whether, in case the defence of said Julia to said bill shall prevail, and the company shall lose so much of its debt, by reason of the negligence or misconduct of the petitioner, in taking such mortgage, it should be
12 paid to him at all, but applied on said debt, and therefore the *therefore the* respondent ought not to be required by a writ of mandamus from this honorable court, to allow said claim and make an order for its payment contrary to his judicial judgment; wherefore he humbly prays to be hence dismissed without day, and that he may have judgment against the petitioner for his costs and disbursements in this behalf most wrongfully sustained.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

J. N. DOLPH,
Counsel for Respondent.

DISTRICT OF OREGON:

I, Matthew P. Deady, being first duly sworn, do depose and say that the foregoing answer is true, as I verily believe.

MATTHEW P. DEADY.

Subscribed and sworn to before me this February 18, 1885.
[SEAL.]
R. H. LAMSON,
Clerk U. S. Circuit Court for Oregon.
By G. G. GAMMANS,
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SUPREME COURT U. S.
FILED
MAR 26 1885
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

OCTOBER TERM 1884.

No. 8. Original.

Ex Parte, In the Matter of the Petition of ELLIS G. HUGHES for a Writ of Mandamus.

DEMURRER TO SUFFICIENCY OF THE RETURN.

BRIEF AND ARGUMENT

OF

JOHN H. MITCHELL,
Counsel for Petitioner.

THOMAS MCGILL & CO., Law Printers, Washington, D. C.

Supreme Court of the United States.

October Term 1884.—No. 8. Original.

Ex Parte, In the Matter of the Petition of Ellis G. Hughes for a Writ of Mandamus, Matthew P. Deady, Respondent.

Brief and Argument of JOHN H. MITCHELL, *Counsel for Petitioner, on Demurrer to the Sufficiency of the Return.*

STATEMENT OF THE CASE.

I.

This case is original in this court, being an application for a writ of mandamus.

It is respectfully submitted that all the material averments in the petition, and which, uncontradicted or unavoided, clearly entitle petitioner to a peremptory writ of mandamus, are admitted in the return of respondent; and nothing sufficient has been set up in avoidance.

The salient and material averments in this petition, which are not denied in, and therefore admitted by, the return, are, in brief, as follows:

I.

That petitioner, Ellis G. Hughes, is an attorney-at-law, duly admitted and practicing in the courts of the State of

Oregon and in the Circuit and District Courts of the United States for the District of Oregon. (Petition, p. 2.)

II.

That on and prior to the 3d day of May, 1882, there was pending in the Circuit Court of the United States within and for the District of Oregon a certain suit in equity, in the nature of a suit for the foreclosure of a certain mortgage on real property, and for other relief, and in which one William Reid, manager, was plaintiff, and H. McCallister and W. B. McCallister, with others, were defendants. (Petition, p. 2.)

III.

That since the commencement of said suit up to and on the said 3d day of May, 1882, and continuously, up to the present time, petitioner had been, and is now, the duly authorized, empowered, and acting attorney and counsel of the plaintiff in said suit for the conduct and manage-

ment of the same for and on behalf of, and as the attorney-at-law of, the plaintiff therein. (Petition, p. 2.)

IV.

That on the said 3d day of May, 1882, on a proper case made and shown, William Reid, manager, plaintiff therein, recovered in said suit a certain decree as against the defendants H. McCallister and W. B. McCallister, and a certain order of sale, wherein and whereby it was ordered, adjudged, and decreed that the defendants H. McCallister and W. B. McCallister should pay to the plaintiff a certain sum of money, and interest as therein specified, and also the costs and disbursements in the said suit to be taxed, "including ten per cent. on the full amount due from the defendants H. McCallister and W. B. McCallister to the complainant, *as an attorney's fee to the attorney of the complainant*," and that in default of such payment being made that certain lands in said decree and order of sale set out and described be sold (the quotation above being part of said decree *todiem verbis*). (Petition, p. 3.)

V.

That petitioner, as the attorney of the plaintiff in said suit, by express agreement, and by the express terms and

conditions of said decree and order of sale, was the absolute and unconditional owner of the attorney's fee recovered therein and thereby as part of the costs of said suit, and also had a certain claim on said decree as for cash paid out by him in the way of the payment of the expenses of conducting said suit and obtaining said decree, as per items, and for which a general recovery was had therein, as per costs and disbursements to be taxed, and, with the exception of payment of part thereof to him—to wit, $519.04 (the sum total of said attorney's fee, exclusive of interest since November 24th, 1884, being $959.10; $17.80, disbursements of petitioner in said suit as above; $20, the docket fee allowed by the statute; and the costs and disbursements of petitioner on his application to the court for an order compelling the purchaser of real property at master's sale to pay the purchase-money into court, as stated in respondent's return, (see page 3 of return,) $22.14;—amounting in all to $1,019.04,) is now the absolute and unconditional owner of the attorney's fee recovered in said decree, and has now his claim for cash paid out by him as aforesaid. (Petition, p. 3.)

VI.

That on the 17th day of October, 1884, the lands set out in the said decree and order of sale, and therein and thereby ordered to be sold, were sold as in and by said decree and order of sale directed to be done; that the

purchaser at said sale was the Dundee Mortgage and Trust Investment Company, the corporation of which the said William Reid, the plaintiff in said suit, had been manager, and for whom he acted in carrying on said suit, said company being the real owner of said decree and order of sale in said suit had and recovered; that, as a matter of fact, no money was paid on said sale, but the amount bid was applied in payment of the amount due the said corporation. The Dundee Mortgage and Trust Investment Company, the real owner of the claim sued on and recovered on in said foreclosure suit, except that the said corporation, purchaser aforesaid, paid the costs of said sale in cash. (Petition, p. 3.)

VII.

That on the 3d day of December, 1884, the said sale so as aforesaid made, and then standing as confirmed, and the amount due petitioner under said decree and order of sale as for his attorney's fee and the costs paid by him having been regularly ascertained and determined, the said purchaser at said sale paid to the clerk of the Circuit Court of the United States for the District of Oregon, the court in which said decree and order of sale was recovered as aforesaid, the full amount of the said attorney's fees, with interest and the costs and disbursements as aforesaid.

VIII.

That by Rule No. 20 of said court it is provided as follows:

"Money brought or paid into court shall be delivered to the clerk, who, unless he immediately pays the same to the party entitled to receive it, shall deposit it in the name and to the credit of the court with such depository as may be designated by law or by the order of the court."

That the said clerk of said court did deposit the money so as aforesaid paid to him, to wit, said attorney's fees and other costs and disbursements due petitioner, with the First National Bank of Portland, that being the duly designated depository, to the credit of the court.

That Rule No. 21 of said court is as follows:

"Money deposited as provided in Rule 20 shall only be paid out on an order signed by the clerk and countersigned by a judge of the court."

IX.

That on the 4th day of December, 1884, the petitioner, having learned that his said attorney's fee and disbursements as aforesaid had been so paid in, applied to and requested the clerk of said court to pay said money, to wit,

the attorney's fee and disbursements aforesaid, to him, but was by said clerk informed that he had no power to draw or pay the same except on an order signed by Matthew P. Deady, the then present and acting judge of said court.

That petitioner did thereupon, as averred in his petition, apply to and request the said Matthew P. Deady to, as judge of said court, sign an order for the payment of said money to him, but that he, the said Deady, did refuse to take any action in the matter except on a motion duly and regularly filed in writing and heard in open court.

While wholly immaterial, as viewed by counsel, in view of the fact of the subsequent application of petitioner in open court for the payment to him of his attorney's fee and disbursements aforesaid, and of the denial of such application by the respondent, it is due to candor that it should be here stated that the respondent in his return makes a qualified denial of the allegation of the petitioner, to the effect that he had been requested, as judge of said court, to sign an order for the payment of said money to petitioner, which qualified and somewhat peculiar, not to say evasive, denial is in the following words (see Return, p. 4):

"Nor is it true, as alleged in said petition, that the respondent was ever asked to countersign any such order, or that he refused to do so, for the sufficient reason that there is not now, nor never was, any money in the registry of said Circuit Court subject to be drawn out on the order of its clerk under said Rule 20 for any such purpose, but said $500 remains in the registry of the court in the same condition as when it was received there, subject to the judicial action and judgment of said court, and not to the mere check or draft of the clerk, countersigned by any judge thereof."

It is somewhat singular, to say the least, that the judge should *deny* that he was ever requested by petitioner to countersign such order, that he should further *deny* that he refused to sign it, and then conclude with an averment of the reasons why he refused to do so.

X.

That thereupon, on the said 4th day of December, petitioner did make in writing, and did file in said United States Circuit Court, his certain motion, asking that the money so paid in as and in payment of his attorney's fee and costs and disbursements paid by him as aforesaid be paid over to him. And on the 5th day of December, 1884, the said United States Circuit Court being then in session, with the said Matthew P. Deady presiding as judge thereof, did bring said motion on to be heard; whereupon it was ordered by said court that all of said sum so as aforesaid paid in as and for petitioner be paid to petitioner, save and excepting the sum of $500; that is to say, there being then in the depository of said court belonging to petitioner, as his attorney's fee and disbursements aforesaid, the sum of $1,019.04, the said court did make an order that there be paid to petitioner the sum of $519.04, but did refuse, and ever since has refused, and does now refuse, to order the

other $500 to be paid to petitioner, though petitioner did again, on the 12th day of December, 1884, apply to the court when in session for an order for the payment to him of said money.

XI.

That there are no proceedings of any kind or nature whatsoever brought by any one now pending in said court, or in any other court, and under or by which any claim is made by any person or persons other than the petitioner on said sum of $500 now in the depository of said court, or in, under, or by which any manner of objection or exception is made by any one to the payment of said sum to the petitioner; but that the said respondent, in his capacity as judge of said court, and acting for and as said court when it is in session, does arbitrarily, and of his own motion, refuse to sign or countersign the order necessary to enable petitioner to withdraw his money from the depository of the said court.

XII.

That no claim has ever been made by any one, nor is any such claim made by the respondent in his return, to

the effect that petitioner, as the attorney in said foreclosure suit, was only entitled to share *pro rata* with the owner of the balance of said decree the moneys realized from the sale of the mortgaged premises, such moneys being only about one-fifth of the whole amount of the judgment.

The foregoing is a full and fair statement of the *admitted facts* of this case, if we may except the wholly immaterial issue raised by the qualified denial in the return of respondent in reference to the alleged demand by petitioner and refusal by the respondent to countersign an order for the payment of this money, which issue, if it may be properly called such, is hereinbefore referred to in subdivision IX of the foregoing statement of *admitted facts*.

The Issues raised by the Return.

It is proper next to inquire, in arriving at a correct conclusion as to the precise nature of the case and the exact questions now here for consideration, how far and to what extent the foregoing *conceded facts* are to be affected or avoided by any or all of the averments contained in the return of the respondent.

Before proceeding to state precisely what is averred in such return as matter of avoidance of these *admitted facts*, the attention of the court is especially attracted to the suggestion that the great mass of statement in such return, in fact all of it, with but few exceptions, which it is claimed

are quite immaterial, and which will be cited presently, is little else than a mere elaboration of the circumstances surrounding, and which lead up to, the *admitted facts* aforesaid, as stated in the petition. For instance, the statements in the return, commencing on the first page, descriptive of the character of the notes sued upon; the default made in the payment of the first note; the declaration that the whole amount of $7,775.90 was declared to be due; the description of the land mortgaged; the receipt by the mortgagee of $1,000 from an insurance company on account of said debt, for the loss of a house on the premises by fire; the sale of two hundred and twenty acres of the mortgaged premises prior to the commencement of the foreclosure suit to satisfy a former lien, and other similar statements, are wholly immaterial, and at most, in their nature and effect, cumulative and in affirmation of the material facts stated in the petition.

The respondent then proceeds—after admitting the sale of all the mortgaged premises included in the decree and ordered to be sold; the purchase of the same by the Dundee Mortgage and Trust Investment Company for the sum of 2,000; their refusal to pay said purchase-money into court, except enough to cover expenses of sale, amounting to $72.20, claiming the right as the real owner of the mortgage and decree to retain the remaining $1,927.80, and apply the same on the latter, which claim had been acquiesced in by the master—to explain in his return *how* this money, or rather *that portion of it* necessary to pay the petitioner's attorney's fee and disbursements awarded to him in the decree of May 3d, 1882, came subsequently to be paid into court. The petitioner had simply averred the *fact*, and this was all that was necessary, that (see Petition,

p. 4) "the amount due your petitioner under said decree and order of sale as for his attorney's fee and the costs paid by him having been regularly ascertained and determined, the said purchaser at said sale *paid* to the clerk of the Circuit Court of the United States for the District of Oregon—the court in which said decree and order of sale was recovered as aforesaid—as and for and in payment of the claim of your petitioner for his attorney's fee and the costs and disbursements paid by him as aforesaid, the full amount so as aforesaid ascertained and determined to be due your petitioner therefor."

It is respectfully submitted it is quite immaterial *how* it was paid in—whether voluntarily, or through an order of the court making it necessary, though still a voluntary act, in order to prevent their purchase from being set aside. But the respondent has deemed it important to state the proceedings which led to its payment, which in brief are these:

On October 28th, 1884, the petitioner herein filed a petition in said Circuit Court stating, in substance, the facts of the sale and the refusal of the purchasers to pay over the amount of their bid, and asking that the master and the purchaser be required to show cause why the sum of money for which said property sold should not be paid over to the master and brought into court, or the sale set aside and the property resold; that on November 10th the master and company (the purchaser) showed cause, and the matter was heard before the respondent, who, on November 24th, made an order in the premises. This portion of the return is here quoted in full, as follows:

"On October 28th, 1884, the petitioner filed a petition in said Circuit Court stating, in substance, the facts aforesaid, and asking that the master and said company be required to show cause why the sum of money for which said property was sold to the latter should not be paid over to the master and brought into court, or the sale set aside and the property resold; that on November 10th the master and company showed cause, and the matter was heard before the respondent, when it appeared that the plaintiff, Reid, took the notes and mortgage aforesaid as the agent and manager of said company, and that on April 7th, 1883, he duly assigned the same to it; that the petitioner, at and before the commencement of the suit aforesaid and the execution of said mortgage, was the regular attorney of said company in and about the business of loaning money in Oregon, in which it was then engaged, and, as such attorney, expressly undertook that the title of the mortgagors to the premises mentioned in said mortgage was good in law, and that the same was not incumbered, except by the Dickson mortgage aforesaid, and that the mortgage was in legal form and duly and truly executed; that at and before the commencement of said suit said petitioner had a contract with said company, by the terms of which he was to have the right to foreclose said mortgage and all others taken by him for it, and receive therefor the attorney's fee allowed by the decree of the court in each case, but was not to be entitled to the same until the debt and costs found due the company had been paid or made out of the property mortgaged.

"And that afterwards, in the year 1882, a disagreement occurred between the petitioner and the company, and the latter refused to be bound any longer by said contract or to recognize the petitioner as its attorney, and refused to furnish him with the mortgage in said suit, so that he might take testimony therein and prepare the same for a final hearing as between the company and said defendant Julia; whereupon—it appearing to the respondent that the only matter in dispute between the parties was the disposition or application of the sum claimed by the petitioner as an attorney fee and costs, the company maintaining that the

petitioner was not entitled to receive any portion of the proceeds of the sale of the property as an attorney fee or otherwise until its claim against the mortgagors was satisfied, nor until he had prosecuted said suit to a final decree as against all the defendants therein, to which the petitioner replied that the company, having refused generally to be bound by the contract, under which its debt was to be preferred to his fee, could not have the benefit of it in this case as against the petitioner, and that he was ready and willing to prosecute said suit to a final determination whenever the company would permit him—an order was made on November 24th that said sale be set aside and the property resold, unless the company, within ten days thereafter, paid into court, 'subject to the further order of the court,' the sum of $799.25, with interest thereon from the date of said decree; in all, the sum of $959.10, together with $17.80 disbursed by the petitioner in said suit, and the docket fee of $20 allowed by the statute, and the costs and disbursements of that proceeding, taxed at $22.14."

Return, pp. 2, 3.

The respondent, proceeding further in his return, (p. 3,) makes the following denial and averment:

"And respondent, further answering, shows and avers that it is not true, as stated in said petition, that any sum of money was ever paid into said Circuit Court 'in payment of the claim of the petitioner for his attorney's fee'; but the truth of the matter is that a sum equal in amount to said claim was paid into said court, in pursuance of the order thereof, as aforesaid, there to be kept, disposed of, and applied in said suit as said court might afterwards determine and provide."

The respondent in his return, in referring to the application of petitioner to have the moneys—his attorney's fee and costs—thus paid in turned over to him, and the refusal of respondent to grant such application, except as to a part

thereof—$519.05—makes the following, in some respects, and especially in the latter part, rather remarkable statement, to wit:

"On December the 4th the petitioner made an application to said Circuit Court, stating that said company had paid therein, in pursuance of the order aforesaid, the sum of $1,039.42, and asked that the same might be 'paid to him by the clerk;' whereupon this respondent made an order in said court 'that there be paid to said Hughes [the petitioner] out of said funds—the $1,039.42 aforesaid—the sum of $519.04,' which amount was afterwards received by the petitioner from the depository of the court on an order or draft signed by the clerk and countersigned by the respondent; but this respondent declined to make any disposition of the rest of said fund until the company had notice of said application and could be heard thereon; that on December 12th said application was further heard in said court before this respondent; and it appearing from the admissions of said petitioner and company then and there made that said suit was not yet prosecuted to a final determination, and that as to the land belonging to the defendant Julia, included in said mortgage, it stood on the bill, her answer and the replication thereto, and also that the company had requested the petitioner to prosecute said suit to a final determination, which he was ready and willing to do, and it appearing to the respondent that although the decree already given in the suit may *have definitively settled the amount of the petitioner's compensation* for attending to the same, although $500 is an ample allowance therefor, yet *neither by the terms of said decree nor the right and justice of the case was he entitled to the same until he had earned it by prosecuting said suit to a final decree as to all the defendants therein*, and therefore denied said application, and left said fund in the registry of the court, to be disposed of or applied hereafter as the rights of the parties and justice of the case may require."

The foregoing is a full and fair statement of the whole case as now presented by the pleadings; and on these the

petitioner submits the following demurrer to the sufficiency of the return:

1st. Because it appears from the face thereof that the matters and things therein averred constitute no sufficient answer to the petition filed herein or the claim of petitioner.

BRIEF AND ARGUMENT.

In presenting this case, counsel for petitioner assumes that in no case will this honorable court direct a peremptory writ of mandamus to issue unless the petitioner presents a case showing he has a clear legal right, and is without any other plain, speedy, or adequate legal remedy; or, in other words, as stated by Mr. Justice Yeates in Commonwealth *v.* Rosseter, 2d Bur., 360, "To found an application for a mandamus, the established rule of law is, there ought in all cases to be a specific legal right, as well as the want of a specific legal remedy, unless, as it is said in some cases, the remedy be extremely tedious." In the case at bar it is respectfully submitted petitioner has a *clear, legal right*, and, except by mandamus, is *without any legal remedy.*

POINT I.

By the decree of May 3d, 1882, the *legal right* of petitioner as the attorney of the complainant in the foreclosure suit to ten per centum on the full amount of $7,364.08, with interest thereon at the rate of twelve per centum per annum from the 17th day of August, 1881, to that date, was *finally adjudicated* in his favor, *as part of the costs in said suit,* "as an attorney's fee *to the attorney of the complainant.*"

It is conceded that from this decree no appeal was ever taken, nor was there ever any proceedings of any character instituted by any one for the purpose of reforming, impeaching, or setting it aside.

POINT II.

The relation of petitioner to the complainant in the foreclosure suit, wherein the decree of May 3d, 1882, was rendered, being that of the attorney of complainant in the

prosecution of that particular suit, and in the recovery of that particular decree, entitled petitioner to a priority of payment out of the first moneys realized from a sale of the real property included in the decree, of the amount of petitioner's fee, as *definitively determined by the decree.*

POINT III.

The only question ever raised by any one other than respondent in the court below, or before the respondent, as judge thereof, in reference to the right of petitioner to the attorney's fees and disbursements in question, or in reference to his right of priority of payment, was fully and finally determined and *adjudicated*, and the amount of petitioner's claim fully paid into court by the purchaser, The Dundee Mortgage and Trust Investment Company, who was also the real party in interest *prior* to the filing of the petition herein.

POINT IV.

It is clear petitioner is remediless, except he is entitled to the writ of mandamus.

POINT V.

The writ of mandamus is not invoked in this case to compel the performance of a legal duty, as is frequently the case, when a court is compelled to act, without directing *how* he shall act. Nor yet is it desired that this remedy shall be applied herein to a judicial act to correct an error, as in a case wherein a judicial act has been erroneously performed; for in such a case, except in certain peculiar exceptions, it is conceded mandamus will not lie, but it is invoked for the purpose of compelling respondent to do a *specific act*, which he has refused to do, and which is not judicial, but purely ministerial, in its nature.

In *Ex-parte* Newman, 14 Wallace, 168–9, this court said:

"Superior tribunals may, by mandamus, command an inferior court to perform a legal duty, where there is no other remedy; and the rule applies to judicial as well as to ministerial acts, but it does not apply at all to a judicial act to correct an error, as where the act has been erroneously performed. If the duty is unperformed, and it be judicial in its character, the mandate will be to the judge, directing him to exercise his judicial discretion or judgment, without any direction as to the manner in which it shall be done; or, if it be ministerial, the mandamus will direct the *specific* act to be performed. (Carpenter *v.* Bristol, 21 Pick., 258; Angel and Ames on Corp., 9th ed., sec. 720.)"

Moses on Mandamus, page 48, says:

"The law makes a distinction between the *ministerial* and *judicial* duties of *judicial tribunals*. In the former case the particular duty imposed may be *compelled*, while in the latter case the judicial officer can only be compelled to proceed and render some judgment."

Can there be any question that under the circumstances of this case as presented by the return that the *specific act* which petitioner seeks in this proceeding to compel respondent to perform is *not* judicial, but purely ministerial, in its character? The answer to this question, it is submitted, will be made clearly apparent by the suggestions that are to follow.

Point VI.

Conceding, for the argument, that any question as to the right of petitioner to priority of payment could remain open for determination by any tribunal at the instance of any person after the rendition of the decree of May 3d, 1882, then clearly it was finally determined by the respondent in the order of November 24th, 1884, wherein the sale was ordered set aside unless within ten days thereafter the purchaser should pay into court "*the attorney's fee mentioned*

in said decree, to wit, seven hundred and ninety-nine dollars and twenty-five cents," &c., &c.; and most clearly and fully did respondent recognize the *priority* right of petitioner by his ministerial order of December 4th, "*that there be paid to said Hughes out of said funds the sum of* $519.04," which amount was about *fifty per cent.* of the whole sum claimed by petitioner; whereas a *pro rata* with the Dundee Mortgage and Trust Investment Company—the real owner of the judgment—would have been but about $175, as the amount of the decree at date of master's sale (exclusive of the amount claimed by the petitioner, about $1,000) was about $10,000, while the sum total of amount received from sales of property, exclusive of costs of sale, was only $1,927.80; hence a *pro-rata* distribution would have given of this amount only $175.25 to petitioner, and $1,752.55 to the mortgage and trust company representing the complainant; whereas, under the order of Judge Deady, petitioner actually received $519.04, while the owner of the decree, other than that part relating to the attorney's fees, received but $1,408.76.

The truth is, no question as to the petitioner only being entitled to share *pro rata* with the owner of the decree the proceeds realized from the sales was ever raised by any one, not even, so far as appears by the respondent, in any of the proceedings in the court below, nor in his return; but, on the contrary, the *sole* ground, as appears from the return, upon which respondent refused to order the balance of said attorney's fees paid over to petitioner, was, *not* for the reason that he was only entitled to share *pro rata* with complainant, or his assignee, the moneys realized; *not* because the amount of petitioner's fees could by any future order or judgment of the Circuit Court, or of respondent, as judge thereof, or any other tribunal, *be changed* from that *fixed by the decree* of May 3d, 1882; *not* because in his judgment the amount of such attorney's fees had not been *finally adjudicated* by such decree,

for he himself hath said it in his return "that although *the decree* already given in the suit may have *definitively settled the amount of the petitioner's compensation for attending to the same*," (see Return, p. 3,) but was, as stated in the return, because, in the opinion of respondent, the decree of the court of two years before, definitely fixing petitioner's fee at about $1,000, to the contrary notwithstanding, $500 was "*an ample allowance*," (see Return, p. 3,) and for the further reason, because, in his opinion, as thus stated in his return, "neither by the *terms of said decree nor the right and justice of the case* was he entitled to the same *until he had earned it by prosecuting said suit to a final decree as to all the defendants therein*." (Return, p. 6.) Although respondent, in view of his own orders in the case and the plain elementary principle of law applicable to it, felt compelled to admit that "the decree already given in the suit may have *definitively settled the amount of the petitioner's compensation*." And as this portion of the respondent's return sets forth the *only reasons* finally presented why petitioner is not entitled to the balance of the attorney's fees claimed by him, the same is here given in the words of respondent, as follows:

"But this respondent declined to make any disposition of the rest of said fund until the company had notice of said application, and could be heard thereon; that on November 12th said application was further heard in said court before this respondent; and it appearing from the admissions of said petitioner and company then and there made that said suit was not yet prosecuted to a final determination, and that as to the land belonging to the defendant Julia, included in said mortgage, it stood on the bill, her answer, and the replication thereto, and also that the company had requested the petitioner to prosecute said suit to a final determination, which he was ready and willing to do; and it appearing to the respondent that *although the decree already given in the suit* may have *definitively settled the amount of the petitioner's compensation for attending to the same*, although $500 is an ample allowance

therefor, yet *neither by the terms of said decree nor the right and justice of the case was he entitled to the same until he had earned it by prosecuting said suit to a final decree as to all the defendants therein*, and therefore denied said application."

Return, p. 3.

How, then, does this matter stand as presented by this return alone? Simply thus:

1st. Respondent concedes that the amount of petitioner's attorney's fees was "*definitively settled*" by the decree rendered in the foreclosure suit May 3d, 1882.

2d. He concedes that there is no question of *pro-rata* distribution of the moneys realized from the sales in the case, because he does not claim in his return that there is any such question involved; and by his order handing over to petitioner over *fifty per cent.* of his claim, thus leaving the other part owners of the judgment less than *twenty per cent.* of their claim, he most completely repudiates, not only any question of *pro rata*, but also the claim *hinted at* in the return, but not *averred*, that any issue was ever raised, or *could be legally raised*, subsequent to the decree of May 3d, 1882, to the effect that petitioner had guaranteed that the title of the mortgagors to the mortgaged premises was good in law, and that such premises were not encumbered, and that the mortgage was in legal form and duly executed, and to the effect that by some agreement petitioner was not entitled to his fees "until the debt and costs found due the company had been paid or made out of the property mortgaged." All these alleged issues or claims were by the order of respondent of December 5th, directing $519.04 of this money to be paid to petitioner, conceded by respondent to have been prior to that date finally adjudicated and completely disposed of. This is too clear to require argument. For if, for *any* reason, petitioner was to

be postponed until the "debt and costs found due the company had been paid or made out of the property mortgaged," then clearly petitioner was not entitled to *any part* of his attorney's fees, much less *fifty per cent. thereof.* Not only so, if any legal *claim* was made in the case (and no such claim, as appears from the return, was ever made) which could have been held good on demurrer, whether petitioner had denied the same or not, then clearly *no part* of the money claimed by petitioner should have been paid to him until that claim was adjudicated; and the fact that the amount of $519.04 was paid by order of the Circuit Court, leads irresistibly and conclusively to one of two conclusions: Either that no such claim was ever made, or, if made, it had been finally *adjudicated* and *rejected* either as false in fact or, for some other reason, illegal in its nature.

3d. This, then, leaves as the *only* ground upon which respondent stands—and a careful reading of the return, the major portion of which is made up of *recitals* not *averments of facts*, shows this to be so—are the claims—1st, that the *amount* of the fee, although such *amount* was "*definitively settled*" by the decree, was *more*, in the opinion of respondent, by *double*, than "*an ample allowance*" for the services rendered; (Return, p. 37;) and 2d, that neither by "*the terms of the decree*" nor "*the right and justice of the case*" was he entitled to the fee theretofore "*definitively settled*" by a "*decree of the Circuit Court*," and by that same decree made payable "*within ten days from its date*," until he, petitioner, had prosecuted to a final decree the issue as between complainant and the defendant Julia, which related in nowise to the amount of the complainant's claim or the amount of the claim for attorney's fees, but solely to the security as to a portion of the lands mortgaged.

This is the sum and substance of this return. It is upon these gauzy, untenable grounds, and these alone, that this

respondent arbitrarily refuses to pay over to petitioner the balance claimed and owned by him.

Point VII.

It is not claimed by the respondent in his return, nor is it a fact, that any one has filed any manner of objection to the money being paid over to petitioner. There are no proceedings of any kind now pending as to the balance of these attorney's fees, except those pending between the court and the petitioner. His refusal to order them paid over is not based upon any motion, request, or protest filed or made by any person or persons in opposition to the request of petitioner that they be paid to him, for none such has ever been made or filed by any one. The refusal is at the suggestion and on the motion of the respondent himself, and no one else. And with all deference to this honorable court and to the learned judge who is the respondent herein, it is respectfully submitted that his action in the premises is arbitrary, illegal, and unjust, and amounts to nothing short of an unjustifiable obstruction, under the form of judicial action, and the guise of the exercise of judicial discretion, to the execution of a solemn decree of the Circuit Court.

But now, further, as to the legal propositions involved in this case, and first as to the nature and effect of the decree of May 3d, 1882.

It is respectfully submitted that the following proposition is unanswerable, and needs the citation of no authorities in its support: That the decrees of the Circuit Court, being unappealed from, are final and binding on all parties to the record, as to all facts therein determined, as to all recoveries therein had, and as to all orders therein made, (except on some question of jurisdiction, &c., as to which there is no issue here,) and that they are not subject as to their execution, either to the whim of the court or the

parties. And that if John Doe recovers against Richard Roe a judgment or decree for the sum of $1,000, that that is a determination that there is *then* due from R. R. to J. D. the sum of $1,000, and that, when execution is issued, R. R. can no longer say this amount is *not due*, nor yet that part of it was to be for *future services*, which J. D. may not perform. Nor if it is collected and paid into court, has the court any power to refuse to pay it out for the reason that the judge may think possibly some of it was not due at the time of entering the decree or judgment, or because he has taken a notion some of it was to pay for future services, which have not been rendered. *As to all these questions*, the judgment or decree *is final*. (As a matter of course, no reference is now made to an injunction to restrain an execution at law, or a bill to reform a decree, on the ground of mistake, fraud, or the like, nor is there any such proceeding here; we are dealing only with the discretion, or, say, whim, of the court.) When, therefore, in this case, all proper allegations being made, the proper parties being before the court, it was *decreed* that the plaintiff was entitled to recover of defendants a certain sum of money, and costs and disbursements, in which was to be included a certain *sum* or *per cent.* as an attorney's fee "*to the attorney of the plaintiff*," that was the *end of that matter*, as well as to the principal of the decree as to the attorney's fee. It was a *final determination*, subject, possibly, to appeal or to review on error, but subject to question in no other way; that there was *at that time* due as for principal and interest and the attorney's fee the sum therein specified.

Suppose, now, that, instead of there being a sale of real property under this decree, the defendants McCallister come in to pay it off, can they claim a deduction, on the ground that a part of this attorney's fee is to pay for services *to be rendered by the attorney* which have *not yet been performed*, and the performance of which is to be rendered unnecessary by the payment which they are now making?

Certainly not; for the decree finds that the recovery was to be had at the day of its date; that the plaintiff was *then* entitled to recover for the benefit of and as for his attorney the fee specified, and that is a settlement and ending of that question. That was the object, end, aim, and purpose of the decree, *to settle the rights of the parties*—to determine what the plaintiff was *then* entitled to recover, what the *defendant* was then liable to pay. True, the decree *might* have contained some *contingent provisions*, but it did not; its language was directed to what was *then* due—to what the plaintiff was *then* entitled to have of the defendants.

How can the plaintiff be in any better position than the defendants to raise a question as to the amount recovered by the decree being due? He made a case showing that he was *then* entitled to recover of the defendants his principal and interest, costs, and disbursements, in which latter he must have, as he did, claimed that he was *then* entitled to recover for the benefit of his attorney, and as an attorney's fee *for his attorney*, the sum specified in the decree. Following on, and in pursuance of this claim on his part, he takes a decree in which it is decreed, among other things, that he is *then* entitled to recover for his attorney the fee in question. Now, he cannot be heard to claim, after he has proceeded to execute this decree, and making no move to have it amended in any way, that this attorney's fee was not *then* recoverable for the benefit of his attorney, because some of the work for which it was to pay was not *then* performed, not only because he is bound by the decree and by all its provisions, but also because he could hardly be heard to claim that he had obtained this decree by making false allegations in his bill, and on which the decree was based. He alleged that there was *then* due for his attorney the attorney's fee recovered, and he took a decree that it was *then*, or within *ten days thereafter*, to be paid by the defendants for the benefit of the attorney. There was no allega-

tion and no finding, nor is there any decree, that this attorney's fee had anything whatever to do with compensating for services to be rendered *after the decree was entered;* and if there could be any presumption that it was to do so, it being decreed to be then due and payable, the presumption would be inevitable *that, as to past services, it was to be payment for work done, while as to future it was to be payment in advance* by special agreement; for that it was *then* due and payable and recoverable for the benefit of the attorney, the *decree* settles. That is *res adjudicata* as completely as anything can well be.

And just here attention is specially invited to the fact, *that there are no proceedings of any kind pending to reform this decree in any way; and that what the company resisted, as intimated in the return, was the payment of the fee at all until they had gotten their money in full. Once having had to pay the fee, they have filed no kind of objection to its being paid to petitioner. In refusing to do so, Judge Deady is acting entirely on his own motion.*

Point VIII.

An Order Directing these Attorney's Fees paid to Petitioner a purely Ministerial Act.

These attorney's fees and disbursements having been paid into court, although paid in subject to the further order of the court, there was but *one further order* that could of right be made in the case; that was, to direct them paid to the person to whom the final decree of the Circuit Court determined they belonged, and *such further order* was necessary, and is purely *ministerial in its character*, and no element of the exercise of judicial judgment or discretion enters into it.

It has been held that where a court having rendered a proper judgment refused to issue an execution, or where a judicial tribunal having found all the facts necessary to a

judgment, so that the judgment would be nothing but a conclusion of law upon those facts, the order directing an execution to issue in the former case, and the entering up of the proper judgment in the latter, are *in their nature ministerial*, and in the absence of any other remedy are proper subjects for mandamus.

Moses on Madamus. 51.

Reed Morse, Petitioner, 18 Pick., 443.

In the present case the Court had found all the facts necessary to such an order, to wit: First. That the *amount* of the attorney's fees had been *definitively settled* by the decree of 1882. Second. That there was no ground upon which the claim of the petitioner could be postponed until the complainant in the suit had been fully paid. Third. That the petitioner was not bound to share *pro rata* with complainant the moneys realized from the sale, but was entitled to prior payment. Hence it is that all these questions having been determined in favor of petitioner—as the return clearly shows that they were—then, although in the opinion of respondent the *amount* of said attorney's fees as *settled by the decree* and directed by that decree to be paid *within ten days therefrom*, may have been too much; and although the issue raised by Julia's answer, as to the right of complainant to hold her portion of the mortgaged premises as security may not have been finally determined, and these, as the return shows, were the sole grounds on which respondent refused to turn over these fees to petitioner,—it follows that an order directing this money to be paid to petitioner is simply a *conclusion* of law on the *facts found*, and in its nature *purely ministerial* and not *judicial*, and having refused, although more than once requested to make such order or countersign the necessary draft, as in and by the rule of the court prescribed, a mandamus should issue compelling it done. The truth is simply this, notwithstanding the long recitals in the return, respondent

withholds this money from petitioner on these *sole* grounds: First. Because "neither by the *terms of said decree, nor the right and justice of the case*," petitioner was, in his opinion, entitled to it until the issue raised by Julia's answer was finally determined. This is *all there is of this return.*

Respondent admits, in effect, and it may be said almost in so many words, that no matter how that issue may be determined finally, it cannot affect the right of petitioner to the full amount he now claims. The only thing the respondent does claim is, that he is not entitled to it until that issue is finally determined. The claim is simply absurd.

This application is in no respect dissimilar to an application for a mandamus to compel an inferior court to grant the usual legal process to enforce a judgment or decree. In truth that is precisely in substance and effect what this application is.

It has frequently been held, as was said *supra*, that mandamus is a proper remedy to compel an inferior court to grant the usual legal process to enforce a judgment.

Terhune *v.* Barcalow, 6 Halst., 38.

Land *v.* Abrahams, 3 Green, 22.

Stafford *v.* Union Bank of Louisiana, 17 How. U. S. Rep., 275.

Stafford *v.* New Orleans Canal and Banking Co., 17 How., 283.

Wherein can arise the difference between the act of a court in refusing to grant the usual legal process to enforce a judgment or decree and his act refusing to order paid over money actually paid into court in satisfaction or part satisfaction of a judgment or decree, either voluntarily by the judgment debtor, or which may come into the possession of the court, as in this case, through an execution sale of the debtor's property to the person who is entitled

to it by virtue of the *specific terms of such judgment or decree?* It is confidently submitted there is no difference.

Furthermore, where a *ministerial duty* devolves upon a judicial tribunal, and such tribunal construes it to be a *judicial duty*, and proceeds to act *judicially* in the matter, and gives judgment against the party moving such performance, and refuses to perform the duty, a mandamus lies to compel the performance.

Delaney *v.* Goddin, 12 Gratt. Va., 266.
Moses on Mandamus, 49.

In other words, because an inferior judicial tribunal mistakes the character of a certain official duty, and determines that what is in truth and fact a mere ministerial duty is a judicial one, such determination of it, if in the opinion of a Superior Court wrong—is not conclusive; and if on such false premise there has been a refusal to do a certain plain duty, a mandamus will lie to compel it.

This court, in Life Ins. Co. *v.* Wilson, 8 Peters, 291, directed a peremptory mandamus to issue compelling the judge of a District Court of the United States to sign a judgment rendered by his predecessor in office; and it was further held in that case that the act of signing was a *ministerial* and not a *judicial* act.

The discretion which courts in America may exercise in issuing writs of mandamus is not an *arbitrary one;* it is a *judicial discretion;* and when there is a right, and there is no plain, speedy, or adequate remedy, this writ should not be denied. The power to issue a mandamus is not in America regarded as a prerogative power.

The Proprietors of St. Luke's Church *v.* Slack, 7 Cushing, 226.
Kentucky *v.* Dennison, 24 How. U. S. Rep., 66.

The writ of mandamus, although originally a prerogative writ, has for a long time, like the writ of error, become a writ of right.

Kendall *v.* The United States, 12 Peters, 613.

In the case of Kendall, just cited, this court by mandamus directed the Postmaster-General to credit the relators with the amount *found due them* by the Solicitor of the Treasury, under an act of Congress, holding that the act required was purely ministerial, about which the Postmaster-General had no discretion, and that in such a case the writ of mandamus "*was the fit and appropriate remedy.*"

So here the amount has not only been *found due* petitioner, but has been *found due* by the *final decree* of a *judicial tribunal* of the United States, directed paid *by that tribunal* within a *given time*, and has *actually been paid into court*, and over one-half the amount been *actually paid to petitioner by the order of respondent;* and now he arbitrarily refuses to permit him to obtain the balance, and for excuse presents reasons which cannot stand a moment against a demurrer; hence here also is the writ of mandamus "*a fit and appropriate remedy.*"

Where an inferior court make an order in a case which is in violation of the plain legal rights of one of the parties, and by virtue of such order refuse to proceed further in the case, the inferior court can, on mandamus, be compelled to vacate the order.

The People *v.* The Judges of Washington County, 1 Cowen, 576.

Point IX.

There can be no manner of question but what this attorney's fee belongs to petitioner as an equitable assignee, in so far of the decree, and that the plaintiff has no manner

of interest therein. There is really no question of attorney's lien in the case, for the reason that the question all the way through has been the question arising between the attorney and client as to right to *priority of payment*, and there could be no question of notice. Yet the question of lien arises, as showing how a part of the decree belongs to the attorney.

It is a rule, old and well settled, that the attorney has a lien on a judgment or decree for his costs and fees forming part thereof, and that if he has given due notice thereof the plaintiff has no control of the judgment as thereto.

Andrews *v.* Morse, 12 Conn., 444.
Martin *v.* Hawks, 15 Johns., 405.
McGregor *v.* Comstock, 28 N. Y., 237.
Marshall *v.* Meech, 51 N. Y., 140.
Bickford *v.* Ellis, 50 Maine, 121.
Newbert *v.* Cunningham, 50 Maine, 232.
Daniels' Chancery Practice, vol. 2, 1842, 1845.
Currier *v.* Boston and Maine R. R., 37 N. H., 223–227.

In the case of Andrews *v.* Morse, 12 Conn., *supra*, the court held:

"That the attorney of a judgment creditor has a lien upon the judgment and execution as against the debtor, with notice, for his services and disbursements in the progress of the suit, which courts of law and equity will protect."

Therefore, where an attorney, having obtained a judgment in favor of his client, claimed a lien thereon for his fees and disbursements, and gave notice of such claim to the creditor and debtor, after which the debtor paid the amount of the judgment to the creditor, regardless of the attorney's claim, it was held that, notwithstanding such payment, the attorney was entitled to proceed with the

execution against the debtor, and enforce payment to the extent of his fees and disbursements.

Lord Mansfield held, in the case of Welsh *v.* Hale (Doug., p. 238):

"That an attorney had a lien on the money recovered by his client for his costs. If the money come into his hands, he may retain to the amount of his bill. He may stop it *in transitu* if he can lay hold of it. If he apply to the court, they will prevent its being paid over till his demand is satisfied. And if the attorney gave notice to the defendant not to pay till his bill should be discharged, a payment by the defendant, after such notice, would be in his own wrong, and *like paying a debt which has been assigned after notice*."

In Read *v.* Dupper, (6 Term Rep., 361,) Lord Kenyon said:

"The principle had been settled long ago that the party should not run away with the fruits of the cause without satisfying the legal demand of his attorney, by whose industry and expense those fruits were obtained."

In Turwin *v.* Gibson, (3 Atk., 719,) Lord Hardwicke held:

"That the attorney, in consideration of his trouble and the money disbursed for his client, has a right to be paid out of the duty decreed for the plaintiff, and has a lien upon it; and that such was constantly the rule of the court."

In Marshall *v.* Meech *et al.*, 51 New York, *supra*, the court said:

"It has long been settled that an attorney has a lien for his costs and compensation upon the judgment recovered by him. Such a lien existed before the code, and is not affected by any provision of the code. The lien exists not only to the extent of the costs entered in the judgment, but for any sum which the client agreed his attorney should have as a compensation for his services. *To the amount of such lien the attorney is to be deemed an equitable assignee of the judgment.*"

Attorneys are allowed two species of liens as security for the payment of their compensation and cost—general and particular.

The particular lien, among other offices, attaches to the fruits of a judgment or decree which the attorney's services have obtained.

Ex-parte Price, 2 Ves., Sr., 407.
Turwin *v.* Gibson, 3 Atk., 720.
Mitchell *v.* Oldfield, 4 Term Rep., 123.
Skinner *v.* Sweet, 3 Madd., 244.
Weeks on Attorneys-at-Law, 607.

The lien attaches to money payable to the client under the judgment or by virtue of an award, (Tabrau *v.* Horn, Mees & R., 228; Omerod *v.* Gate, 1 East., 404; Heacht *v.* Chipman, 2 Aiken, 162,) *or paid or payable into court in the course of an action at law or in equity.*

Weeks on Attorneys-at Law, 608.

The Supreme Court of the United States held, in Wylie *v.* Cox, 15 How., 415, that an attorney employed to prosecute a claim before a commission for a contingent fee of five per cent. had a lien for this amount on the fund recovered, and such a one as the court would enforce by a bill in equity.

The attorney or solicitor, who is also counsel in a cause, has a lien on moneys collected therein for his fees and disbursements in the court.

In re Paschal, 10 Wall., 493.

Besides, in this case the attorney had a lien upon property secured by the mortgage, and involved in the litigation, for his fees, and the *lis pendens* and final decree was a general notice of such lien; and the client cannot, by a transfer or otherwise, defeat the claim.

Hunt *v.* McClanahan, 1 Heisk., 503.
Weeks on Attorneys-at-Law, p. 606.

"Where the judgment is for costs, the record is sufficient notice to all parties."

McGregor *v.* Comstock, 28 N. Y., 237.
Haight *v.* Holcomb, 16 How. Pr., 173.
Weeks on Attorneys-at-Law, p. 625.

The old Cincian law of the Romans entitled "*De Donis et muneribus*," and recorded by Tacitus in his "Annals" to the effect "*nequis ob causam orandam pecuniam donumve accipiat*," and which was for many centuries in a modified form, to the effect that an attorney could not maintain an action to recover his fees, followed by the judicial tribunals of England and other countries, and even for a time in many of the American States, has now no place in our jurisprudence; but, by the decisions of this court made these later years, members of the legal profession are justly accounted worthy of their hire, and, in common with the members of all other professions and occupations, are accorded the right of action to recover a *quantum meruit*, or a stipulated fee for services rendered, with, in addition, the right of lien as stated.

Wylie *v.* Coxe, 15 How., U. S. Rep., 416.
In re Paschal, 10 Wall., U. S. Rep., 493.

As most of the cases cited *supra* have arisen on questions as to recovery from defendants, and the rights of attorneys in proceeding against them, as for their own rights under the decree or judgment, the question of notice is involved in most of them. It is clear, however, that the rule proceeds on the theory that, as between the client and the attorney, the latter *owns the judgment or decree* to the full extent to which his payments and fees form a part thereof, and that the notice required is only for the same purpose and on the same ground as in the case of notice of the assignment of a chose in action; that is, to protect the person to whom the notice is to be given, that he may not

suffer harm by dealing in good faith with the *apparent* owner, who is not the *real* owner. Three of the cases cited *supra*, to wit, 15 Johnson, 405, 51 New York, 140, and 50 Maine, 232, go the full length of holding that the attorney stands in the position of an assignee of the judgment or decree to the extent to which he has a lien upon it; and it is evident that the notice has nothing to do with the working of the claim of the attorney, *as between himself and his client*, or as *against the judgment or decree;* it is only to give notice to the other party, who presumably would not otherwise be informed of the true state of the case and the rights of the attorney.

But in the case at bar there can be no question of notice, or as to lien, or as to equitable assignment. All that was determined and fixed when the decree was entered; and the decree is *in express terms*, to the effect that this attorney's fee was recovered and was to be paid for petitioner's benefit. The decree works the assignment, determines the amount to be paid, *when it shall be paid*, and gives the notice *as to whom it belongs*. In short, under this decree the petitioner became a party to it of record, with a *definitely-ascertained and determined interest*.

When the property was sold under the decree, and the company, which was in fact the real owner of the interest represented by Reid, being the purchaser at the sale, refused to pay over the purchase price, under a claim that, as owners of the decree, they were entitled to retain it, and as the bid had been accepted by the master, petitioner's only recourse was to take proceedings to set the sale aside for want of payment and on the ground that he was entitled to *first* payment.

The only question which could in fact be raised under this proceeding was one of priority of payment. If the company in fact owned the decree, and were entitled to first payment, there not being enough to satisfy both, nor enough to satisfy them, there was no reason why they should pay over anything.

The claim was made, as appears from the return—1st. That petitioner was not entitled to prior payment because of an express agreement that the company should have prior payment. To this petitioner replied that that agreement was a conditional one, and the condition had been broken by the company. 2d. That all the work in the case not being performed, that petitioner was not entitled to more than a proportionate amount of the fee. To this petitioner answered that the amount of the fee was determined by the decree of May 3d, 1882.

As the decree of May, 1882, did in fact and in law settle the *amount* of the fee and *when it was due*, the only question before the court at this hearing, or which it had any power to pass upon under these proceedings, if indeed it had that power, no reformation of the decree being asked or fraud or mistake alleged, was as to the right to *priority of payment*. When respondent decided that they must pay over the money, he decided this question in petitioner's favor. The amount involved permits of no appeal; that question, therefore, is *at rest forever*.

The decision rendered by Judge Deady on the hearing for an order setting aside the sale unless the money was paid over being a mere determination of the question of priority of payment, it may well be said the money came into court in satisfaction of petitioner's part of the decree of May, 1882. The order made by Deady of November 24th, 1884, is in fact an order of distribution. The reasons are these:

By the decree of May, 1882, the master was ordered to sell for cash, which he was to bring into court. The master had, therefore, no right or power to sell in any other way.

See Gordon *v.* Hobart, 2 Story, 261.
Stonington, L. B., *v.* Davis, 15 N. J. Eq., 31.
Harris *v.* Fly, 7 Paige Ch., 424.
Williamson *v.* Berry, 8 Howard, 544.

The master regarding the company which owned Reid's interest as in fact the owner of the entire decree, treated their bid and application of the amount to payment of the decree as in fact so much cash.

Petitioner applied to have the sale set aside, because the money was not brought in to satisfy his part of the decree; that is to say, that is the effect of the application, which was in terms to have the sale set aside, because the terms of the order of sale were not complied with.

The company sought to retain the money on the ground that they were entitled to *first payment*, and, therefore, *to the whole of it*, and to have the sale confirmed.

To compel the company to pay over all the money, when they were entitled to all but what belonged to petitioner, would have been simply to compel them to pay over simply to draw out again.

The court had a right to waive their paying over what belonged to them. It ordered them to pay over what belonged to petitioner, and allowed them to retain what belonged to them.

There can, also, be no question but that the court had no power to order anything paid to petitioner, under this decree, or out of this money, save only what was due him *in the case under the decree*, as for a demand, which was rendered *certain by the decree:* that is to say, it could not have allowed petitioner as for any outside claim or demand that he might hold, nor could it have, in this proceeding, ordered payment of an outside demand, even if in judgment. It was confined to making such order as should *carry out* the decree already rendered.

If correct in this, then the order of November, 1884, was nothing more than a distribution of the amount realized under the decree of May, 1882, and this distribution was had by determining who was entitled to priority of payment, the determination of who was entitled to the entire amount which the decree covered, and the amount

to which each was entitled, having been had under the decree of May 3d, 1882.

There can be no doubt, therefore, that the question of priority of payment as between petitioner and the company was set at rest by Judge Deady's decision ordering the money paid over, and from which there can be no appeal. And this result was fully emphasized by the payment to petitioner of the $519.04.

The reasons leading to this decision in favor of petitioner's prior right to payment were doubtless these:

The amount recovered here as attorney's fee is recovered as a *fee to the attorney of the plaintiff* for services rendered by the attorney to the plaintiff in recovering this very decree, and for which the plaintiff was *bound to pay the attorney in the first instance.* As to the amount due the attorney, having procured the decree for the amount, the plaintiff can no longer question it. The attorney is in nowise concerned with the question of the sufficiency of the security taken by the plaintiff for his money. The claim of the attorney being against the plaintiff in the first instance, he is of necessity entitled to priority of payment to the full amount of his fee out of the proceeds of the decree.

As to the effect of the order made by Deady in his order of November, 1884, that the money should be paid in, "*subject to the further order of the court,*" it would seem that the whole question is answered, as to his power to make this reservation, or to exercise any discretion in making an order to pay it out, by an answer to the question as to whether the court can retain money paid in in satisfaction of a judgment or decree duly rendered, to be paid out when it pleases.

It appears too plain for argument that when a decree or judgment, final in its nature as to the amount of recovery, unless appealed from or reviewed on error, is duly entered by the Circuit Court, and the money comes into court in

satisfaction of that decree or judgment, that it does not rest in the discretion of the court to pay or not to pay such money to the party in whose favor the judgment or decree was rendered, and who was thereby adjudged to be entitled to it. If it did, the last state of the judgment creditor would be worse than the first—he could not sue the court to recover his money. No mandamus could issue where it was a matter of discretion. How would he ever get his money? If the court could retain indefinitely money paid in in satisfaction of judgments and decrees, because, perchance, the judge might get an impression that the judgment was for a greater amount than it should be, then, indeed, are judgment creditors in such a case remediless.

If this is the fact and the law, what has the fact that the judge in this case made a special order to retain the money until he saw fit to pay it over got to do with the case? It is not a question of *special orders*; it is a question of *power*. If a special order is all that is needed, he might make one in each case after the judgment or decree was rendered, as he did here, *and on his own motion, as he did here, for no one asked or showed cause for such an order.*

But again, the special order made in this case, the reservation that the amount was to be paid "subject *to the further order of the court,*" goes no further than his rule goes to this case, and is in effect the *same as the rule.* The rule allows no money to be paid out without an order of the court, after it has once passed into the depository of the court; but the question of his *power to exercise discretion* in paying out the money which comes into court in satisfaction of judgments and decrees is the very question at issue here, and makes no particle of difference whether he undertakes to exercise this discretion under a *special order* or under his *rule.* The gist of the whole business is, that the decree of May, 1882, *settled this matter so as to leave him no discretion.* He could not cut the fee down, because,

fixed by that decree, he determined the question of *priority of payment* in petitioner's favor, and he cannot now retain the money or any part of it, because the decree of May 3d, 1882, determined the question and found that it was *then* due and payable. The court can no more play fast and loose with its decrees than can one of the parties to it.

Conclusion.

In conclusion, while it is true that the amount of money involved in this proceeding is not large, it is respectfully submitted that the maxim *de minimis non curatur* should not be applied to the amount involved in a proceeding of this character; and while it is true that in a money sense, *Le jeu ne vaut pas la chandelle*, yet the principle involved is one of vital importance in the administration of justice, as affecting the powers of courts and judges, the rights of parties litigant—especially judgment creditors—and of the profession as well.

Nor should the fact that the respondent herein is a distinguished judge, occupying an exalted judicial position, weigh a feather in the consideration of the questions involved; for, as so well said by Chief Justice Marshall, in the celebrated case of Marbury *v.* Madison, 1 Cranch Rep., 170:

"It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."

Nor would the further observations of the late Chief Justice in the same case, although made with reference to an executive and not a judicial officer, be inapplicable in the case under consideration, when, after discussing the political powers of the President and of his Cabinet Ministers, wherein it was held that the acts of the former on subjects political were not subject to question by man-

damus or other judicial proceedings, and that the acts of the Cabinet Ministers on matters purely political were the acts of the President, and also exempt from judicial question, concluded as follows:

"But when the Legislature proceeds to impose on that officer [the Secretary of State] other duties, wherein he is directed peremptorily to perform certain acts where the rights of individuals are dependent on the performance of these acts, he is so far the officer of the law, amenable to the laws for his conduct, and *cannot at his discretion sport away the vested rights of others.*"

It was most truly and beautifully said, in reference to the theme now sought to be impressed on the minds of this honorable court by the Chief Justice of the Supreme Court of the State of Ohio, in the case of the State *v.* The Governor of Ohio, (5 Ohio, 534,) that—

"Under our system of government, no officer is placed above the restraining authority of the law, which is truly said to be universal in its behests, 'all paying it homage, the least as feeling its care, and the greatest as not exempt from its power.'"

The same doctrine was forcibly maintained by Mr. Justice Field over a quarter of a century ago, when a member of the Supreme Court in the State of California, in McCauley *v.* Brooks, 16 Cal., 41, where, in speaking of the right of a party in a proper case to the writ of mandamus, he said:

"The truth is, no officer, however high, is above the law; and when duties are imposed upon him in regard to which he has no discretion, and in the execution of which individuals have a direct pecuniary interest, and there is no other plain, speedy, and adequate remedy, he can be required to perform those duties by the compulsory process of mandamus."

All of which is respectfully submitted.

JOHN H. MITCHELL,
Counsel for Petitioner.

damus or other judicial proceedings, and that the acts of the Cabinet Ministers on matters purely political were the acts of the President, and also exempt from judicial question, concluded as follows:

"But when the Legislature proceeds to impose on that officer [the Secretary of State] other duties, wherein he is directed peremptorily to perform certain acts where the rights of individuals are dependent on the performance of these acts, he is so far the officer of the law, amenable to the laws for his conduct, and *cannot at his discretion sport away the vested rights of others*."

It was most justly and beautifully said, in reference to the theme now sought to be impressed on the minds of this honorable court by the Chief Justice of the Supreme Court of the State of Ohio, in the case of the State *v.* The Commissioners of Ohio (6 Ohio, 544):

"Under the system of government we all profess to admire and above the restraining arm of the law, which is truly said to be universal as to subjects, all paying it homage, the least as justly as the greatest as not exempt from its power."

The same doctrine was recently maintained by Mr. Justice Field over a quarter of a century ago, when a member of the Supreme Court in the State of California, in McCauley *v.* Brooks, 16 Cal., 11, where, in speaking of the right of a party in a proper case to the writ of mandamus, he said:

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All of which is respectfully submitted.

JOHN H. MITCHELL,
Counsel for Petitioner.

Office Supreme Court U. S.
FILED.
MAR 28 1885
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States

OCTOBER TERM 1884.

No. 8. Original.

Ex Parte, In the Matter of the Petition of ELLIS G. HUGHES for a Writ of Mandamus, MATTHEW P. DEADY, Respondent.

BRIEF FOR RESPONDENT.

J. N. DOLPH,
Counsel for Respondent.

THOMAS McGILL & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

October Term 1884.—No. 8. Original.

Ex Parte, In the Matter of Ellis G. Hughes for a Writ of Mandamus, Matthew P. Deady, Respondent.

BRIEF FOR RESPONDENT.

STATEMENT.

This proceeding is an application for a writ of mandamus to be directed to Matthew P. Deady, as judge of the Circuit Court of the United States for the district of Oregon, commanding him to order to be paid to the petitioner $500, now in the registry of said court, claimed by the petitioner.

Upon the filing of the petition an order to show cause why the writ should not issue as prayed for was made by the court, and the present hearing is upon the return of the respondent to that order.

The following is a copy of the return:

Supreme Court of the United States.

October Term 1884.—No. 8. Original.

EX PARTE, IN THE MATTER OF ELLIS G. HUGHES, PETITIONER.

On Petition for a Writ of Mandamus.

Return to Rule to show Cause.

Now at this day comes Matthew P. Deady, the respondent in the above-entitled matter, and shows cause why a writ of mandamus should not issue, as prayed for in the petition herein, as follows:

On November 25, 1879, H. McCallister and W. B. McCallister, of Marion County, Oregon, borrowed of William Reid, manager, of Portland, Oregon, the sum of $7,000, and gave their promissory notes therefor and the interest to accrue thereon, payable in eleven installments, the first note being for $709.60, and payable on December 1, 1880; and at the same time, and as a security for the payment of said notes, they and their respective wives, Julia and Mariam, executed and delivered to said Reid a mortgage upon three parcels of land in said county, containing 408, 320, and 160 acres, respectively, subject to a prior mortgage on the north 220 acres of the first parcel, to secure a debt due Eliza E. Dickson; and said mortgage contained a provision that in case default was made in the payment of any of said eleven notes, then, and in that case, the whole debt was to become due and payable at the option of the mortgagee, and bear interest at the rate of 12 per centum per annum, and that "there should be recovered in any suit or proceeding to foreclose said mortgage, as part of the costs thereof, an attorney fee of ten per centum on the full amount found due."

Default was made in the payment of the first note, and on January 1, 1881, the whole debt, then amounting to $7,775.90, was declared due.

On August 17, 1881, the mortgagee received from an insurance company $1,000 on account of said debt for the loss of a house on the premises by fire; and prior to the

commencement of the suit to foreclose this mortgage the north 220 acres of the first parcel of land was sold to satisfy a decree obtained by said Dickson in a suit to enforce the lien of her mortgage thereon.

On September 21, 1881, Reid commenced a suit in the United States Circuit Court for the district of Oregon, by his attorney, the petitioner, against the parties to said mortgage of November the 25th, and sundry subsequent incumbrancers, to enforce the lien of the same by a sale of the premises, in which default was made by all the defendants except Julia, the wife of H. McCallister, who, on December 3, 1881, answered the bill, setting forth that she was the owner of the south 204 acres of said first-mentioned parcel of land, and could neither read nor write, and alleging that she signed said mortgage without knowing that her land was included therein, and upon the express representation of the agent of the petitioner, who procured her to sign the same, and took her acknowledgment thereof, that it was not; to which answer a general replication was filed on February 14, 1882.

On March 29, 1882, a decree *pro confesso* was taken in said suit against all the defendants, except said Julia, and on May 3 thereafter a decree was taken against the makers of said notes for the sum of $7,364.08, with interest at 12 per centum per annum from August 1, 1881, and costs of suit, "including ten per centum on the full amount due from the defendants H. McCallister and W. B. McCallister to the complainant, as an attorney's fee, to the attorney of the complainant," and that in default of payment thereof all the interest of said defendants and their wives in the second and third mentioned of said parcels of land be sold by the master, as upon an execution at law, who should report his "proceedings on such sale" within ten days thereafter; that on October 17, 1884, the master put the premises up at auction, as directed by the decree, when The Dundee Mortgage & Trust Investment Company became the purchaser of the same at $2,000, and paid the master thereon the expenses of the sale, amounting to $72.20, but claimed the right, as the real owner of the mortgage and decree, to retain the remaining $1,927.80, and apply the same on the latter, which claim was acquiesced in by the master.

On October 28, 1884, the petitioner filed a petition in said

Circuit Court, stating, in substance, the facts aforesaid, and asking that the master and said company be required to show cause why the sum of money for which said property was sold to the latter should not be paid over to the master and brought into court, or the sale set aside and the property resold; that on November 10th the master and company showed cause, and the matter was heard before the respondent, when it appeared that the plaintiff Reid took the notes and mortgage aforesaid as the agent and manager of said company, and that on April 7, 1883, he duly assigned the same to it; that the petitioner, at and before the commencement of the suit aforesaid and the execution of said mortgage, was the regular attorney of said company in and about the business of loaning money in Oregon, in which it was then engaged, and, as such attorney, expressly undertook that the title of the mortgagors to the premises mentioned in said mortgage was good in law, and that the same were not incumbered, except by the Dickson mortgage aforesaid, and that the mortgage was in legal form and duly and truly executed; that at and before the commencement of said suit said petitioner had a contract with said company, by the terms of which he was to have the right to foreclose said mortgage, and all others taken by him for it, and receive therefor the attorney's fee allowed by the decree of the court in each case, but was not to be entitled to the same until the debt and costs found due the company had been paid or made out of the property mortgaged.

And that afterwards, in the year 1882, a disagreement occurred between the petitioner and the company, and the latter refused to be bound any longer by said contract or to recognize the petitioner as its attorney, and refused to furnish him with the mortgage in said suit, so that he might take testimony therein and prepare the same for a final hearing as between the company and said defendant Julia; whereupon, it appearing to the respondent that the only matter in dispute between the parties was the disposition or application of the sum claimed by the petitioner as an attorney fee and costs, the company maintaining that the petitioner was not entitled to receive any portion of the proceeds of the sale of the property, as an attorney fee or otherwise, until its claim against the mortgagors was satisfied, nor until he had prosecuted said suit to a final decree

as against all the defendants therein, to which the petitioner replied that the company, having refused generally to be bound by the contract under which its debt was to be preferred to his fee, could not have the benefit of it in this case as against the petitioner, and that he was ready and willing to prosecute said suit to a final determination whenever the company would permit him, an order was made on November 24th that said sale be set aside and the property resold, unless the company, within ten days thereafter, paid into court, "subject to the further order of the court," the sum of $799.25, with interest thereon from the date of said decree, in all the sum of $959.10, together with $17.80 disbursed by the petitioner in said suit, and the docket fee of $20 allowed by the statute, and the costs and disbursements of that proceeding, taxed at $22.14.

On December the 4th the petitioner made an application to said Circuit Court, stating that said company had paid therein, in pursuance of the order aforesaid, the sum of $1,039.42, and asked that the same might be "paid to him by the clerk;" whereupon this respondent made an order in said court "that there be paid to said Hughes (the petitioner) out of said funds (the $1,039.42 aforesaid) the sum of $519.04," which amount was afterwards received by the petitioner from the depositary of the court on an order or draft signed by the clerk and countersigned by the respondent; but this respondent declined to make any disposition of the rest of said fund until the company had notice of said application and could be heard thereon; that on December 12th said application was further heard in said court before this respondent; and it appearing from the admissions of said petitioner and company then and there made that said suit was not yet pro-ecuted to a final determination, and that as to the land belonging to the defendant Julia included in said mortgage it stood on the bill, her answer and the replication thereto, and also that the company had requested the petitioner to prosecute said suit to a final determination, which he was ready and willing to do, and it appearing to the respondent that although the decree already given in the suit may have definitely settled the amount of the petitioner's compensation for attending to the same, although $500 is an ample allowance therefor, yet neither by the terms of said decree nor the right and justice of the case was he entitled to the same

until he had earned it by prosecuting said suit to a final decree as to all the defendants therein, and therefore denied said application, and left said fund in the registry of the court, to be disposed of or applied hereafter as the rights of the parties and the justice of the case may require.

And the respondent, further answering, shows and avers that it is not true, as stated in said petition, that any sum of money was ever paid into said Circuit Court "in payment of the claim of the petitioner for his attorney's fee," but the truth of the matter is that a sum equal in amount to said claim was paid into said court, in pursuance of the order thereof, as aforesaid, there to be kept, disposed of, and applied in said suit as said court might afterwards determine and provide; nor is it true, as in said petition alleged, that the clerk of said Circuit Court was ever ready or willing to sign an order on the depositary of said court for the payment of said sum to the petitioner under Rule 20 thereof, which order is in effect a mere check or draft on said depositary; nor is it true, as alleged in said petition, that the respondent was ever asked to countersign any such order, or that he refused to do so, for the sufficient reason that there is not now, nor never was, any money in the registry of said Circuit Court subject to be drawn out on the order of its clerk under said Rule 20 for any such purpose, but said $500 remains in the registry of the court in the same condition as when it was received there, subject to the judicial action and judgment of said court, and not to the mere check or draft of the clerk, countersigned by any judge thereof.

And the respondent respectfully submits, the premises considered, that it is a matter within the judgment of said Circuit Court whether the balance of the fee claimed by the petitioner in said suit shall be paid to him out of this fund before the same is ended and the fee fully earned, or whether, in case the defense of said Julia to said bill shall prevail, and the company shall lose so much of its debt, by reason of the negligence or misconduct of the petitioner in taking such mortgage, it should be paid to him at all, but applied to said debt; and therefore the respondent ought not to be required by a writ of mandamus from this honorable court to allow said claim and make an order for its payment contrary to his judicial judgment; wherefore he humbly prays to be hence dismissed without day, and that he may have judgment against the petitioner

for his costs and disbursements in this behalf most wrongfully sustained.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

J. N. DOLPH,
Counsel for Respondent.

DISTRICT OF OREGON.

I, Matthew P. Deady, being first duly sworn, do depose and say that the foregoing answer is true, as I verily believe.

MATTHEW P. DEADY.

Subscribed and sworn to before me this February 18, 1885.

[SEAL.] R. H. LAMSON,
Clerk U. S. Circuit Court for Oregon.
By G. G. GAMMANS,
Deputy.

(Indorsed:) Supreme Court U. S., 1884. October term. No. 8, orig'l. *Ex parte*, In the matter of Ellis G. Hughes, petitioner. Return to rule.

(Stamped:) Office Supreme Court, U. S. Filed Feb. 26, 1885. James H. McKenney, clerk.

The principles of law applicable to this case are well settled by the decisions of this court. The office of a mandamus is to compel the performance of a plain and positive duty. It is issued upon the application of one who has a clear right to demand such a performance and who has no other adequate remedy. It is never granted in anticipation of an omission of duty, but only after actual default.

Ex-parte Cutting, 94 U. S., 14.

Mandamus will not lie to revise a judgment of an inferior court.

Ex-parte De Groot, 6 Wall., 497.
Decatur *v.* Paulding, 14 Pet., 497.
Kendall *v.* The United States, 12 *Id.*, 527.
Brashear *v.* Mason, 6 How., 92.
The United States *v.* Guthrie, 17 *Id.*, 284.

Mandamus will not lie to control the judicial discretion of a court.

Phillips' Practice, Ed. 1878, pp. 356, 357.
Ex-parte Bradstreet, 4 Pet., 102.

The same principle is applied to proceedings by mandamus against executive officers of the Government; and the judiciary cannot interfere with such officers in the discharge of their official duties unless those duties are of a character purely ministerial and involve no exercise of discretion.

Litchfield *v.* Register and Receiver, 9 Wall., 575.
The Secretary *v.* McGarrahan, *supra*, 298.

A judge must exercise his discretion in those intermediate proceedings which take place between the institution and the trial of a suit.

Phillips' Practice, Ed. 1878, 356.
Fire Insurance Company *v.* Adams, 9 Pet., 573.
Ex-parte Bradstreet, 8 Pet., 590.
Ex-parte Hoyt, 13 Pet., 279.
Ex-parte Myra Clark Whitney, 13 Pet., 404.
Ex-parte De Groot, 6 Wall., 497.

In this case it does not appear that the petitioner has a clear right to an order for the payment to him of the money in controversy, and therefore mandamus will not lie.

It does appear that the Circuit Court, upon due consideration, adjudged that the petitioner had not a present right to the money, and that judgment cannot be revised by mandamus.

By the terms of the order under which the money was paid into court it is still subject to the order of the court.

The petitioner's application for an order directing the payment to him of the money in question was an intermediate proceeding between the institution and trial of the suit, and its allowance or disallowance was within the judicial discretion of the court.

The decree of May 3d, 1882, by which petitioner claims that the attorney fee mentioned in that decree became vested in him, is immaterial to the question under consideration. The money in controversy was neither collected upon said decree nor paid into court upon the same. The rights of the parties to the money must be determined by the order under which it was paid into court. The words in said decree "to the attorney of the complainant" are mere surplusage. The petitioner was not a party to the suit, and there does not appear to have been any allegations or proof upon which a decree in his favor could have been rendered. The decree is in express terms in favor of the complainant in the suit for the amount of the attorney fee adjudged to be recovered, and in that respect it follows the stipulation for the payment of attorney's fees contained in the mortgage. There cannot be a decree in the same suit in favor of different parties for the same money.

If the decree of May 3d, 1882, however, should be held to be a decree in favor of the complainant in the suit for the principal and interest of the mortgage debt, and in favor of the attorney of the complainant for the amount recovered as attorney's fees, still, when the proceeds of the mortgaged property shall have been brought into court, if insufficient to pay both amounts in full, the court will have jurisdiction to marshal such proceeds between the two; and if the disposition of the proceeds made by the court should be erroneous, an appeal from the decision of the court will be the only remedy of the parties. The money in controversy now in the registry of the court is not a portion of the proceeds of the sale of the mortgaged property. It was paid into court by the Dundee Mortgage and Trust Investment Company upon the order of the court, not as a payment to the petitioner, but in the nature of security to him, and to enable the court to make such summary order as justice may require as between

the company and the petitioner, when the suit was finally disposed of and the amount of the proceeds of the sale of the mortgaged property ascertained. It is apparent that the petitioner's right to the money must be determined alone from the order under which it was paid into court. If the court had intended it as payment to the petitioner, that would have been the order. The fact that the money was ordered to be paid into court, "*subject to the further order of the court*," shows that the disposition of the fund is still within the judicial discretion of the court.

J. N. DOLPH,
Counsel for Respondent.